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ENVIRONMENTAL OFFENCES IN NOVA SCOTIA

NOVA SCOTIA DEPARTMENT
OF ENVIRONMENT

MAY 1992

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ENVIRONMENTAL OFFENCES IN NOVA SCOTIA

Nova Scotia Department of Environment
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Nova Scotia

Department of the Environment

Office of the Minister

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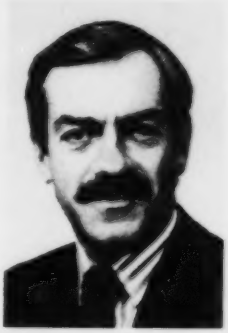
Our file no.

MESSAGE FROM THE MINISTER



The Environmental Protection Act became law in Nova Scotia in 1973. Since that date, the Department of the Environment has expanded greatly and presently administers 14 statutes and 31 sets of regulations.

To ensure that Crown prosecutors, defence lawyers and judges in the provincial court system are familiar with current Acts and regulations, the Department has prepared a Manual on Environmental Offences in Nova Scotia. This initiative was announced by my predecessor, the Honourable John G. Leefe, at a meeting of the Atlantic Environment Ministers in Charlottetown, P.E.I., in August of 1991.

The Ministry of Environment in Ontario produced a similar manual in 1989, which was updated in January, 1991. The Nova Scotia Department of the Environment wishes to thank the Ontario Ministry for their very kind permission to use parts of their manual.

I would also wish to express my gratitude to Mr. Robert G. Grant and other solicitors at the law firm of Stewart, McKelvey, Stirling, Scales for their work in preparing the initial drafts of this Manual. My appreciation is also extended to Mr. J. Marshall Burgess, solicitor at the Department of Attorney General, who has overseen this project from the start.

As Minister of the Environment it is my sincere wish that the Manual provide another useful tool in the Department of Environment's mission to manage, protect and enhance the natural environment of the Province of Nova Scotia.

Terence R.B. Donahoe

HALIFAX, Nova Scotia
May, 1992.

Honourable Terence R.B. Donahoe, Q.C.
Minister of the Environment

Nova Scotia

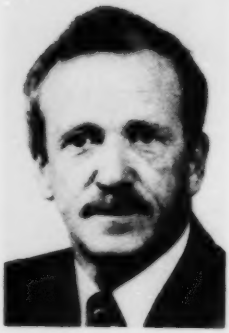
Department of the Environment

Office of the Deputy Minister

PO Box 2107
Halifax, Nova Scotia
B3J 3B7

Our file no.

MESSAGE FROM THE DEPUTY MINISTER



This Manual of Environmental Offences in Nova Scotia represents a major advancement in the enforcement of environmental legislation. It is in the interests of all parties - government, legal counsel, judges and the general public that the administration of environmental law is pursued in a consistent and demonstrably fair manner.

It is the sincere hope of myself and the staff of the Nova Scotia Department of the Environment that this Manual become a standard and familiar reference document for all those involved in the prosecution and defence of environmental cases here in the Province of Nova Scotia.

HALIFAX. Nova Scotia
May, 1992

Wayne S. Grady
Deputy Minister of the Environment

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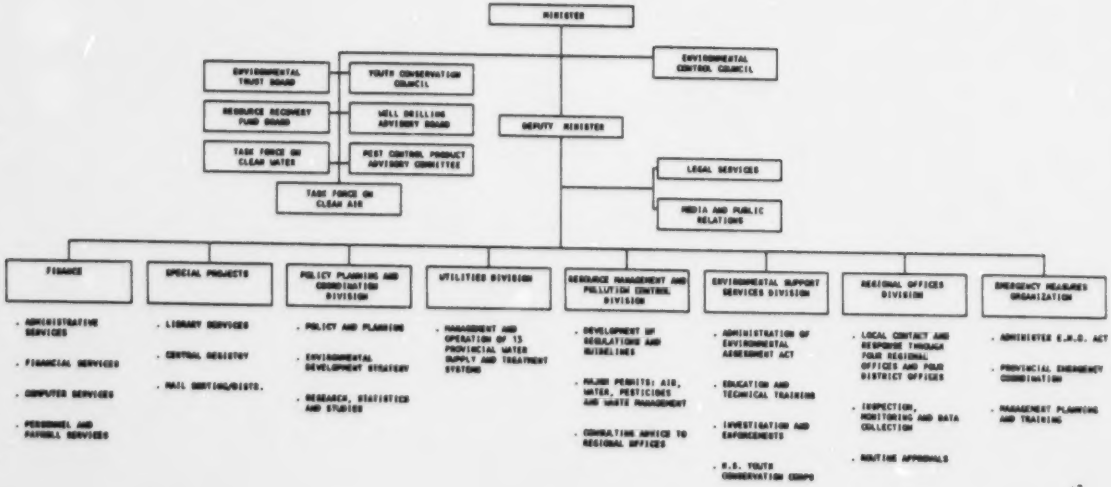
The mission of the Nova Scotia Department of the Environment is to manage, protect and enhance the Province's natural environment. This will be achieved through an integrated environmental planning and management region founded on a broad base of public participation, effective and consistent enforcement, and the efficient delivery of appropriate programs and competent technical services.

APRIL, 1982

N. S. DEPARTMENT OF THE ENVIRONMENT

OPERATING STRUCTURE


MINISTER
ENVIRONMENTAL CONTROL COUNCIL
ENVIRONMENTAL TRUST BOARD
YOUTH CONSERVATION COUNCIL
RESOURCE RECOVERY FUND BOARD
WELL DRILLING ADVISORY BOARD
TASK FORCE ON CLEAN WATER
PEST CONTROL PRODUCT ADVISORY COMMITTEE
TASK FORCE ON CLEAN AIR
DEPUTY MINISTER
LEGAL SERVICES
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. DEVELOPMENT OF REGULATIONS AND GUIDELINES
. MAJOR PERMITS: AIR, WATER, PESTICIDES AND WASTE MANAGEMENT
. COORDINATING ADVICE TO REGIONAL OFFICES
. ADMINISTRATION OF ENVIRONMENTAL ASSESSMENT ACT
. EDUCATION AND TECHNICAL TRAINING
. INVESTIGATION AND ENFORCEMENTS
. N.S. YOUTH CONSERVATION CORPS
. LOCAL CONTACT AND RESPONSE THROUGH FOUR REGIONAL OFFICES AND FOUR DISTRICT OFFICES
. INSPECTION, MONITORING AND DATA COLLECTION
. ROUTINE APPROVALS
. ADMINISTER E.M.O. ACT
. PROVINCIAL EMERGENCY COORDINATION
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I. HISTORICAL BACKGROUND

A. Provincial Involvement

The Nova Scotia Department of the Environment was established in 1973 **(Tab 3)**. As of April 1, 1992, the Department administers a total of 14 statutes **(Tab 5)** and 31 sets of regulations **(Tab 6)**.

Other provincial departments and boards also administer environmental legislation. The Department of Transportation and Communications administers two crucial pieces of environmental legislation, the *Dangerous Goods Transportation Act*, R.S.N.S. 1989, c.119, and the *Motor Vehicle Act*, R.S.N.S. 1989, c.293, each with accompanying regulations. The Department of Health and Fitness administers the *Health Act*, R.S.N.S. 1989, c.195, and the installation of on-site sewage disposal systems established thereunder. Finally, the Public Utilities Board administers the *Salvage Yards Licensing Act*, R.S.N.S. 1989, c.410 and regulations.

1. *Dangerous Goods Transportation Act*, R.S.N.S. 1989, c. 119

This Act adopts the federal *Transportation of Dangerous Goods Regulations* and applies the regulations to the transportation of dangerous goods on Nova Scotia highways. The standards and procedural requirements are taken from the federal Act and regulations. Compliance and enforcement are provided for in the provincial Act. This Act provides for the appointment of inspectors (s.7-9) and it includes enforcement provisions (s.10).

2. Regulations under the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293

Under s.200(1) of the *Motor Vehicle Act*, the Governor in Council passed the *Standards of Vehicle Equipment Regulations* (O.I.C. 85-216, N.S. Reg. 51/85) dated March, 1985, requiring pollution control equipment for new vehicles. This regulation, as amended by O.I.C. 91-293, N.S. Reg. 43/91 dated March 12, 1991, applies to all vehicles of model year 1991 or later registered in the Province of Nova Scotia.

3. Regulations under the *Health Act*, R.S.N.S. 1989, c. 195

Under the *Health Act*, the Governor in Council passed regulations (O.I.C. 82-719, N.S. Reg. 135/82 as amended by O.I.C. 86-797, N.S. Reg. 161/86) respecting subdivision of land to be serviced by on-site sewage disposal systems. An approval is to be sought pursuant to these regulations for the subdivision of a lot serviced by an

on-site sewage disposal system for the purpose of determining whether the resulting lots are sufficiently large to sustain such a sewage disposal system.

4. *Salvage Yards Licensing Act*, R.S.N.S. 1989, c. 410

This Act requires any person who owns or occupies a salvage yard to apply for a licence under this Act and to operate the yard in accordance with the conditions contained in the licence. It is an offence under s.14 of the Act to violate any provision of the Act or regulations. This Act is administered by the Public Utilities Board, and the details for application, granting or refusing to grant a licence under the Act are set out in regulations (O.I.C. 71/39, N.S. Reg. 88/71, as amended by O.I.C. 82-581, N.S. Reg. 102/82).

B. Federal Involvement

The Federal Crown administers a total of 28 statutes that relate to the environment and a total of 49 sets of regulations. The major pieces of federal legislation are the *Canadian Environmental Protection Act*, R.S.C. 1985, c.16(4th Supp.) ("*CEPA*") proclaimed law on June 30, 1988, and the *Fisheries Act*, R.S.C. 1985, c.F-14. The proposed *Canadian Environmental Assessment Act* (Bill C-13, 3d sess., 34th Parl.) will be the third major piece of federal environmental legislation.

1. *Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th Supp.)

This Act is the federal umbrella Act for environmental protection in Canada. It is divided into nine parts, covering a wide range of environmental issues previously either not covered by federal legislation, or covered by a number of individual federal pieces of legislation.

Part I of *CEPA* deals with general environmental quality objectives, guidelines and codes of practice. Part II focuses on toxic substances, covering a wide range of issues including disclosure of information, toxic substances which are new to Canada, and export and import of such substances. Part III deals with the issue of nutrients, whereas Part IV sets the framework for federal departments, agencies, crown corporations and their roles under this Act. Part V provides for standards, regulations, and prohibitions in relation to international air pollution. Ocean dumping is covered in Part VI. The remaining parts of *CEPA* are of a more administrative nature. A large number of regulations have

been passed under the various subject matters covered by *CEPA*. To the extent that they coincide with provincial regulations, reference will be made to them below.

2. *Fisheries Act*, R.S.C. 1985, c. F-14

The scope of the *Fisheries Act* may, on first sight, appear to be very narrow, limited to fish. Because of its application to anything that may have an effect on fish or fish habitat, it is one of the key pieces of federal legislation on the environment. Its range of application is very broad. Any activity that affects water frequented by fish is covered. The Act deals with fishery leases and licences, particularly seal hunting, salmon fishing, lobster fishing, protection of fish habitat and includes offences and punishment provisions. In practice, the administration of major parts of this Act is often delegated to provincial Departments of Fisheries pursuant to regulations passed under the Act. This does not affect the application of the Act, merely its administration.

3. Proposed *Canadian Environmental Assessment Act* (Bill C-13, 3d sess., 34th Parl.)

The proposed *Canadian Environmental Assessment Act* provides for federal environmental assessments of projects which involve federal proponents, federal money, a transfer of an interest in federal land, or other federal action pursuant to a federal legislative or regulatory provision listed in the regulations. In addition, federal environmental assessments are possible where projects may result in adverse environmental effects across a provincial or international boundary, or on federal land.

C. Municipal Involvement

1. Regulation

Municipal governments may enact and enforce by-laws regulating environmentally sensitive activities such as garbage removal and disposal, use of pesticides, topsoil removal, blasting, quarrying and excavating, construction of sewers and obstruction of drains and watercourses.

2. Prohibition

Municipal governments may enact and enforce by-laws prohibiting conduct affecting the environment such as nuisances, noise, unsightly premises, unauthorized sewers, littering and placing unauthorized substances into municipal storm and sanitary sewers.

3. Planning

Through municipal planning strategies, land use by-laws and subdivision by-laws under the provisions of the *Planning Act*, R.S.N.S. 1989, c. 346, municipalities regulate and enforce land use. Such land use regulations may take the form of policies implemented for the improvement of the physical and social environment of the municipality, the protection of lands such as flood plain areas which are considered environmentally sensitive, and the establishment of appropriate standards for services, sewers and storm drainage.

D. Guidelines, Standards and Policies

In addition to the Acts and regulations administered by the provincial and federal departments, there are a number of guidelines, standards or policies in effect. To date, the Department of Environment has 51 sets of guidelines, standards and/or policies (Tab 7) which it administers. Examples of such guidelines are the Pit & Quarry Guidelines and Contingency Plan Guidelines for releases of dangerous goods and hazardous waste.

To date, no court in Nova Scotia has ruled that any of these guidelines are to be treated as regulations. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, a decision of the Supreme Court of Canada rendered January 23, 1992, guidelines in the form of the *Environmental Assessment and Review Process Guidelines Order* established and approved in June, 1984 (S.O.R./84-467) pursuant to s.6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10, were ruled mandatory in nature. The Court distinguished the *Guidelines Order* from mere administrative directives which cannot confer enforceable rights as was the case in *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118. The Court considered it to be a vital distinction that the *Guidelines Order* was promulgated pursuant to s.6 of the *Department of Environment Act* with the approval of the Governor in Council in contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the Minister's authority. At present, most, if not all guidelines of the Provincial Department of the Environment are mere ministerial policy guidelines. It is anticipated that some of these guidelines will be converted to regulations.

E. Applicability of Legislation

1. Government Departments, Agencies, Boards and Commission

Section 50(1) of the *Environmental Protection Act*, R.S.N.S. 1989, c. 150 ("*EPA*") makes it clear that the legislation is binding on all provincial government departments, agencies, boards and commissions. Where affected by an order of the Minister, these bodies may appeal to the Governor in Council under s.38 of the *EPA*.

2. General Exemption

Section 50(2) of the *EPA* and s.4(2) of the *Environmental Assessment Act*, R.S.N.S. 1989, c. 149, make it clear that the legislation does not apply to "accepted ordinary activities of individuals, households and farms except to the extent prescribed by the Governor in Council". This expression has not been judicially considered by the Courts. Regulations have been proclaimed to supersede this exemption. An example of this is found in the *Waste Oil Regulations*, O.I.C. 90-867, N.S. Reg. 198/90 where the Governor in Council has prohibited all persons, including farmers, from applying waste oil as a dust suppressant on the roads. The *Water Act* does not include the general exemption.

3. Crown Immunity

(a) There is a general presumption that legislative enactments do not bind the Crown except by express words. *Interpretation Act*, R.S.N.S. 1989, c.235, s.14.

(b) Section 50(1) of the *EPA* states that the Act applies to Her Majesty "in right of the Province". This appears to limit the legislation to the Nova Scotia government.

(c) So long as the legislation makes it clear that the Province intends that the federal Crown be bound only in areas of provincial constitutional jurisdiction, the Courts are prepared to uphold the legislation. See *Alberta Government Telephones v. Canada (Canadian Radio and Television Corporation)*, [1989] 2 S.C.R. 225.

(d) The Courts have also held that the doctrine of paramountcy of federal legislation will be strictly interpreted so that federal enclaves immune from otherwise valid provincial laws are not set up. Mere duplication of laws is no longer sufficient to invoke this doctrine. See *Canadian National Railway Co. v. Ontario (Director appointed under the Environmental*

Protection Act (1991), 6 C.E.L.R. (N.S.) 211 (Ont.Div.Ct.).

(e) The concept of Crown immunity was reviewed by the Supreme Court of Canada on January 23, 1992, in the case *Friends of the Oldman River Society v. Canada (Minister of Transport)*, *supra*. If there are expressly binding words ("Her Majesty is bound"), if there is a clear intention to bind in the statute or if the intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, in other words, if an absurdity (as opposed to an undesirable result) were produced, the Crown will be bound. The Court held the *Navigable Waters Protection Act* was binding on the Province of Alberta.

II. CONSTITUTIONAL CONSIDERATIONS

A. General Principles

Under the *Constitution Act*, 1867, the Province has jurisdiction over:

- local works and undertakings [s. 92(10)]
- property and civil rights in the Province [s. 93(13)]
- matters of a merely local or private nature [Section 92(16)].

This includes jurisdiction to legislate enforcement provisions including fines and imprisonment (see s. 92(15) *Constitution Act*, 1867 and *R. v. Lake Ontario Cement Ltd., et al.* [1973] 2 O.R. 247 (Ont. S.C.).

An example of the valid exercise by the Province of its power to legislate environmental matters is found in *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.). This case involved a prosecution for unlawfully failing to comply with a Ministerial Order under s.26(1) of the *EPA* to file a clean up plan, put up a fence, and clean up a hazardous waste site. This power would extend to water pollution.

The Supreme Court of Canada has allocated federal jurisdiction over marine pollution in *R. v. Crown Zellerbach Canada Ltd.*, [1988] I.S.C.R. 401. For a general comment on jurisdiction over water pollution before *Zellerbach*, see Laskin's, *Canadian Constitutional Law* (4th ed. rev., Carswell, 1975) at p.507-8 where the learned author cautions that the Province would have to defer to public rights of navigation which could not be impaired save by federal legislation. Subject to this, the Province would be "free to proceed with its own works or schemes".

In *Interprovincial Co-operative Ltd.* v. *R.*, (sometimes referred to as Dryden Chemicals Ltd.) Ritchie J. at p.346 suggested that the federal authorities have exclusive jurisdiction over pollution in interprovincial waters. That suggestion is obiter, unnecessary to the decision which held that a provincial law could not deny a civil right acquired in another province (the right to discharge a contaminant) by granting a civil remedy for the discharge in an adjoining province. It has been, however, supported by the finding of the Supreme Court of Canada in *Zellerbach* that pollution of marine or salt waters because of their inter-provincial nature, is within the jurisdiction of the federal government. Nevertheless, there are no longer any federal enclaves immune from otherwise valid provincial law.

The provinces can, at least in principle, exercise jurisdiction over waterways within the province through s.92(5) of the *Constitution Act, 1867* (management of public lands belonging to the province). "Lands" have been interpreted by the Courts to include water. See *Burrard Power Co.* v. *R.*, [1911] A.C.87. The provinces, in most cases, are the owners of the waterbeds of waters within their territory. See s.109 *Constitution Act, 1867*, and e.g. "La Protection de l'environnement et ses implications en droit constitutionne", (1977), 23 *McGill L.J.* 207 at 217. This gives the provinces the power to legislate to protect their proprietary interests. *Beaudoin, supra* 216-7 and *Dryden Chemicals, supra*, at pp. 335 and 358.

B. Limits on Provincial Legislation

1. There are however, some qualifications to the province's proprietary claim over water. Firstly, there is a corresponding federal power to legislate with respect to public works owned by the Queen in Right of Canada under s.108 *Constitution Act, 1867*. In particular, this power extends to public harbours owned by the Queen in Right of Canada (see Schedule 3 to s.108). One could argue that a spill in a public harbour which was a public harbour at the time of Confederation and was therefore the property of the federal government could have adverse effects on waters and waterbeds beyond the harbour and owned by the province. It could further be argued that land use control in a harbour is an appropriate area of concurrent federal provincial jurisdiction and that the assumption of federal jurisdiction does not per se establish a federal enclave immune from provincial legislation. See *Hamilton Harbour Commissioners v. Hamilton (City)* (1976), 21 O.R. (2d) 459 per Griffiths J. at pp.483 and 485.

The bed of the harbour in *Hamilton Harbour Commissioners* was vested in the Crown in Right of the Province of Ontario at the relevant time and none of the parties to the proceeding took the position that s.108 of the *Constitution Act, 1867*, applied in the circumstances (p.462). Indeed, while affirming the lower Court for the most part, the Ontario Court of Appeal expressly stated that neither the City of Hamilton nor the Province of Ontario had any jurisdiction over land surrounding the harbour and owned by Her Majesty the Queen in Right of Canada (at p.493 per Houlden J.A.). However, this was a case where the law in question was aimed at land use and therefore directly at land.

The Courts have not supported the application of s.92(5) as a constitutional basis for the enforcement of provincial regulations at least with respect to navigable waters. In *St-Denis de Brompton*

(Municipality) v. *Filteau* (1986), 59 D.L.R. (4th) 84 (Que.C.A.) the Court said rather categorically at p.91:

> Exclusive federal jurisdiction to legislate with respect to navigation applies to all navigable waters, including interior waters, no matter who owns the land underneath.

The test for determining the validity of provincial legislation is whether the provinces are attempting to regulate an act which is within federal jurisdiction or merely passing a law of general application which incidentally affects acts within federal jurisdiction or federal Crown lands. See *C.N. Railway Co., supra.*

Thus, in *Construction Montcalm v. Minimum Wage Commission,* [1979] 1 S.C.R. 754, the provincial minimum wage was held applicable to construction workers working at the airport on federal Crown land. While the law may have incidentally affected the use of federal Crown land, it was obviously not intended to have such affect as such an effect was remote and unlikely.

2. The federal Parliament has exclusive power to make laws in relation to lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province. [s. 92(10)(a), s. 91(29)]

The *Constitution Act, 1867,* confers on the federal Parliament exclusive power over navigation and shipping. [s. 91(10)]

3. Works "such as federal railways, things such as land reserved for Indians and persons such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property; provided, however, that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction." See *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)* (1988), 51 D.L.R.(4th) 161 at 169 (S.C.C.).

With regard to the federal responsibility over Indian lands and Indians, the Supreme Court of Canada in *The Queen v. Sparrow*, dated May 31, 1990, affirmed the federal fiduciary obligation with regard to aboriginal treaty rights.

4. Even if the provincial law deals with matters which are within the scope of its jurisdiction such as property and civil rights, it will be constitutionally inoperative with respect to federal undertakings such as railways and ships or undertakings on Indian

lands to the extent that it purports to deal with what makes these undertakings specifically of federal jurisdiction or in other words what is vital or essential to the undertaking. See *Bell Canada, supra*, p.211-2.

5. Once the provincial law purports to affect a vital aspect of the undertaking, there is no need to determine whether the undertaking is impaired or paralysed by the application of the provincial law. See *Bell Canada, supra*, p.243. If, however, the application of the law does indeed impair the federal undertaking this will be of relevance in the ultimate decision to hold the law inoperative with respect to that particular undertaking. See *Bell Canada, supra*, p. 246.

6. Drafting the provincial law so that it applies generally, as opposed to singling out a federal undertaking, will only ensure that the law itself will be upheld as having a legitimate provincial purpose. It will do nothing to save it from remaining inoperative against federal undertakings. In *Bell Canada, supra*, Beetz J. at p. 230 quotes with approval the following passage from an article by Dale Gibson entitled "*The 'Federal Enclave' Fallacy in Canadian Constitutional Law*" (1976), 14 *Alta. L. Rev.* 167 at p. 172:

> If a province enacted a statute regulating the noise caused by aircraft taking off and landing in the province, the statute would be wholly inoperative because it purported to deal with aviation, which is a matter within the exclusive legislative jurisdiction of the Parliament of Canada. Similarly, provincial statutes enacting special provisions for national parks, Indian reserves, defence establishments and so on would probably be ruled *ultra vires* on the ground that they dealt with subjects beyond the competence of the province.
>
> General provincial legislation affecting essential aspects of matters under federal jurisdiction. Even if a province were to enact a general anti-noise statute aimed at every type of noisy activity and every locality in the province, it would be inapplicable to noise caused by aircraft operating within the province. The reason for this is that no provincial statute is permitted to operate so as to affect any "essential" or "integral" aspect of an enterprise under federal jurisdiction, and the noise produced by aircraft would undoubtedly be regarded as integral to their operation.

Indeed, in *R. v. Rice*, [1963] 1 C.C.C. 108 an Ontario County Court found that a municipal anti-noise by-law could not apply to

hydroplane racing in a river in the Township of Anderson. In dismissing the charge against the commodore of the racing club, the Court said that the stream upon which the race was held was a public stream, the federal authority permitted the racing of outboard motor crafts so long as federal regulations were complied with and "the noises resulting from the races are obviously a necessary result of operating the boats, and unless it can be proved (which in the instant case was not proved) that these noises are in excess of or are not those that can be said to follow normally from the operation of these craft, I do not feel that By-law 1575 can have any application to the noises complained of..." See further *St. Denis de Brompton (supra)*. It was suggested in the latter case, somewhat in contradiction to the findings of fact in *Rice* that not all motorboats were noisy, nevertheless, for those that were the solution would be to require mufflers rather than to prohibit all motors, which affected the very essence of the undertaking.

On the other hand, in *Windermere Watersport Inc. v. Invermere (District)* (1989), 59 D.L.R. (4th) 285 (B.C.C.A.) at p.299 Esson J.A. states: "The universal federal authority gives leeway to permit the exercise of provincial authority in relation to the question whether the respondent can operate jet skis on Lake Windermere, an undertaking which is purely local."

The noise by-law cases show that provincial laws which impair a federal undertaking will be interpreted as inapplicable to that undertaking.

7. By analogy with cases decided in relation to s. 91 (24) *Constitution Act, 1867* (Indians and lands reserved for the Indians) neither waterways extending beyond provincial boundaries nor railroad lands and rights of way are entirely immune from valid provincial laws. The concept of a federal enclave was laid to rest in *Cardinal v. Alberta (Attorney General)* (1973), 40 D.L.R. (3d) 553 (S.C.C.) at 560: "but if provincial legislation within the limits of s.92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s.91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves may be affected by it". One question left unanswered by *R. v. Sparrow* is whether the fiduciary obligation with regard to aboriginal treaty rights rests exclusively with the federal government, or whether provinces also have responsibilities in this regard.

Cardinal concerned a prosecution under provincial law for trafficking in big game without a permit. It was followed in two subsequent Supreme Court of Canada cases: *Kruger v. R.* (1977), 34 C.C.C. (2d) 377, which concerned a charge of hunting big game

without a permit and *R. v. Francis* (1988), 51 D.L.R. (4th) 418 (S.C.C.) which concerned a provincial motor vehicle prosecution on an Indian reserve.

8. A constitutionally valid provincial law may be applicable to a federal undertaking, even though it incidentally affects a vital part of its operations. This is perhaps the most important proposition of all because it serves to emphasize that the success of the constitutional argument will depend on the characterization of the overall scheme of the provincial law. If the law is primarily directed in its operation to those aspects which form a vital part of the undertaking it is likely to be inoperative to that extent. If however, the law affects a vital part of the operation but does not go so far as to impair it and if this is merely an incident of a bona fide legislative concern with subjects other than federal undertakings, the law is likely to be applied to the operation of the federal undertaking. (see *Irwin Toy, infra*)

C. Case Law

1. *R. v. Crown Zellerbach,* [1988] 1 S.C.R. 401

In March 1988, the federal *Ocean Dumping Control Act*, now part of the *Canadian Environmental Protection Act*, was the subject of a constitutional challenge by the provinces of British Columbia and Quebec in *R.* v. *Crown Zellerbach,* [1988] 1 S.C.R. 401. The marine area in question, the Strait of Georgia, had been determined to be part of the territory of the province of British Columbia in *Re Ownership of Bed of Strait of Georgia Related Areas*, [1984] 1 S.C.R. 388. The province's case was strengthened by the fact that the offence in question was connected to the forest industry, an area of provincial jurisdiction. The Supreme Court found nevertheless in favour of federal jurisdiction based on the power to legislate over "peace, order and good government", "POGG" (s. 91 of Constitution Act, 1867).

The majority accepted "marine pollution" as the subject matter addressed by the *Ocean Dumping Control Act*. Using this classification of the area legislated, the majority applied the "national concern test" to determine whether the *Ocean Dumping Control Act* was valid legislation under POGG. The national concern test has the following features:

a) the national concern test is distinguishable from the emergency test under POGG in that the latter awards only temporary powers;

b) it applies to matters not considered at Confederation and to those that have become of national importance;

c) the matter in question must be single, distinctive and indivisible so as to be distinguishable from provincial matters; and

d) it has to be shown that the failure of a province to deal with the matter adequately would have extra-provincial consequences.

Applying this test, the majority found marine pollution to come under the federal legislative jurisdiction under POGG. The dissent used "marine environment" as the subject matter to be tested, and concluded that it did not meet the distinctiveness requirement in the national concern test.

The *Crown Zellerbach* decision has ramifications for more than just "ocean dumping control". While it seems to have resolved the constitutional question with regard to "marine pollution" in favour of the federal Parliament regardless of the source of pollution, it is not clear whether land-based pollution of marine waters is also brought under federal jurisdiction by this decision. One has to question whether the third part of the national concern test, which requires the matter to be clearly distinguishable "from matters of provincial concern and a scale of impact that is reconcilable with the fundamental distribution of legislative jurisdiction under the Constitution" (*Crown Zellerbach, at 432*), is met. Keeping in mind that inland waters do not seem to be included in this federal power over marine pollution (in spite of the undisputed impact that fresh water rivers have on the well-being of marine waters), it is not clear to what extent land based marine pollution will be included under "marine pollution".

2. *Canadian National Railway Co. v. Ontario (Director Appointed under the Environmental Protection Act)*, (1991), 3 O.R. (3d) 609 (Ont. Div. Ct.)

In *Canadian National Railway Co. v. Ontario (Director appointed under the Environmental Protection Act)*, (1991), 3 O.R. (3d) 609, it was held that the mere fact that a Provincial Order required the parties to study the nature and extent of contamination and provide remedial strategies for lands (and water) owned, at least in some areas, by the federal government, did not render the Order inoperative.

The Ontario Divisional Court dealt with a number of issues surrounding the question of how federal and provincial areas of jurisdiction relate to each other. The contention on behalf of the

appellants was that Orders made under provincial law are inoperative in so far as they affect areas of exclusive federal jurisdiction such as federal public property or navigation and shipping. This position was taken even though the provincial legislation (the Ontario *EPA*) as a whole was unquestionably enacted within the realm of provincial jurisdiction, namely property and civil rights within the province, and therefore intra vires the provincial legislature.

As long as it was not enacted "in relation to" a federal area of jurisdiction, provincial legislation is valid law and will have force and effect even in circumstances where it affects a federal area of jurisdiction.

The Court found the contention that provincial legislation, validly enacted under property and civil rights in a province, is inoperative on federal lands, to be unsupportable. The Court quoted the following comment made by Beetz J. in *Montcalm Inc. v. Minimum Wage Commission,* [1979] 1 S.C.R. 754, at 777-8:

> The enumeration of exclusive federal powers in S.91 of the Constitution, including the power to make laws in relation to the public debt and property, operates as a limitation *ratione materiae* upon provincial jurisdiction, not as a territorial limitation. The impugned provisions relate neither to federal property nor to any other federal subject but to civil rights and, in my view, they govern the civil rights of Montcalm and its employees on federal property. Federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries any more than Indian reserves.

Finally, the Court held that duplication between federal and provincial legislation in a specific area is not sufficient to invoke the doctrine of paramountcy. Actual conflict has to be shown between the two pieces of legislation. Here the appellants were required to show they could not comply with provincial law without committing a breach of federal law. This they could not show and the doctrine of paramountcy did not apply.

3. ***Irwin Toy Ltd. v. A.G. Que.*** **(1989), 58 D.L.R. (4th) 577 (S.C.C.)**

Irwin Toy applied for a declaration that provisions of the consumer protection law in Quebec which prohibited commercial advertising directed at children were ultra vires the Quebec legislature as affecting a federal undertaking, i.e. broadcasting. Television advertising was found to be the most important form of children's advertising. Advertising revenues were important in the operation

of a television broadcast undertaking and that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs. The Court found that the law was directed at the actions of the advertisers not at the broadcasters directly. The law had a constitutionally legitimate aim namely consumer protection. There was no suggestion that concern with other forms of children's advertising was a mere pretence. The fact that other forms of advertising other than broadcasting were relatively unimportant was of little consequence since there was a bona fide concern for all forms of advertising. The Court noted that since the Act dealt only with advertisers in the province it would have a limited effect on television broadcasters whose signals come from outside of the province and are received directly by the public or re-distributed by a cable company. Rather significantly the Court said at p.605:

> Even if it were true as Panthonic submitted, that applied in this way the provisions prevent the production of programs aimed at children since they remove potential funding for the programs---a contention which was denied by the Attorney General of Quebec, who insisted that advertisers were always free to aim their message at adults rather than children, and which must also be considered in light of the explicit acceptance in the Application Guide for sections 248 and 249 (at p.9) of educational advertising aimed at children produced by private companies---this would only demonstrate that the legislation constrains business decisions both for those who produce advertisements and for those that carry them.

The Court acknowledged in the judgment that television advertising is a vital part of a television broadcasting undertaking. However, it concluded that "The most that can be said, as in ***Kellogg's*** (1978) 2 S.C.R. 211 at p.225, is that the provisions may, incidentally affect the revenue of one or more television stations." The legislation therefore affected a vital part of the operations of the undertaking but was saved because it did so only incidentally and without impairing the operation.

A similar characterization may have been made by the Ontario Court of Appeal in *R. v. T.N.T. Canada Inc.* (1986), 37 D.L.R. (4th) 297 (Ont. C.A.). The Court acknowledged that speed limits and highway load limits interfere with a federal undertaking by forcing compliance and causing delay to interprovincial transport companies that are under tight delivery schedules. It compared this to a requirement for a Certificate of Approval which the Court said must also interfere with the undertaking, but suggested that in these

former cases this interference has never been held to deprive otherwise competent provincial law of effect, and therefore such interference cannot as a matter of logic deprive the approval requirement of effect either (p.304). The latter case may also be an example of a characterization of a Provincial law as affecting an ancillary aspect of a matter within federal jurisdiction. It has been suggested that if such a characterization is made, the provincial law would have to impair or sterilize the federal work or undertaking before it would be declared inoperative. See E. Edinger, (1989) 68 Can. Bar Rev. 631 at 637. This is in contrast to the *Bell Canada* case, *supra*, where the Court found that the interference in the operations of the undertaking was extensive. The legislation at issue, occupational health and safety laws competently passed by the Quebec government under its power to deal with property and civil rights (p.211), created health and safety committees half of whose members were represented and chosen by the workers. These committees enjoyed significant decision making powers including investigative powers and the power to select individual protective devices and equipment, selection of the physician responsible for health services in the establishment and approving that physicians health programme. The administrative agency created by the law to oversee the implementation of the Act, could determine the maximum hours devoted to particular work, prescribe standards of construction, development and maintenance of installations and the standards of use and maintenance of processes, equipment and materials. The Court had little trouble concluding that the law regulated the very management and operations of the undertaking (p.209).

4. ***Friends of the Oldman River Society v. Canada (Minister of Transport)*, unreported decision of the Supreme Court of Canada on January 23, 1992.**

The Court held that the *Constitution Act, 1867,* did not assign the matter of "environment" *sui generis* to either the provinces or Parliament. There is no interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. The Guidelines Order provides the federal initiating authority to examine matters directly related to areas of federal responsibility affected. It cannot be used as colourable devices to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The Guidelines Order was in "pith and substance" nothing more than an instrument that regulates the manner in which federal institutions must administer their multi-farious duties and functions. It is an adjunct of the federal powers affected plus falls under POGG. Any intrusion into provincial matters was merely incidental to the pith and substance of the legislation.

III. SPECIFIC PROVINCIAL LEGISLATION

A. *Environmental Protection Act*, R.S.N.S. 1989, c. 150 ("EPA").

The *EPA* is the basic constitutional document governing the Department of the Environment. The purpose of the Act is to provide for the preservation and protection of the environment (s. 2). The Minister of the Environment assumes the duty of the general supervision and control of the management, preservation and protection of the environment with the obligation to ensure all practical measures are taken to preserve the environment from deterioration. (s. 22)

To fulfil these duties, the Minister is granted broad powers to develop plans to protect the environment, educate the public, conduct research and undertake programs to promote the preservation of the environment. The Minister may coordinate efforts by various government departments to preserve the environment. The Minister may regulate and control operations harmful to the environment. (s. 8)

The Minister's powers to require monitoring of waste discharge (s. 25), to order the cessation of pollution (s. 26), to inspect suspected polluters (s. 43) and to require them to undertake remedial action to eliminate pollution (s. 34) all derive from the *EPA*. The Minister, with the approval of the Governor in Council, has a broad regulation making authority under the Act. (s. 51)

Under the *EPA* "environment" is defined to mean the air, land and water or a combination or part thereof within the jurisdiction of the Province of Nova Scotia. This definition is more restrictive than the definition of environment found under the *Environmental Assessment Act*, R.S.N.S. 1989, c. 149.

Pursuant to the *EPA*, there is established a council known as the Environmental Control Council. The function of the Environmental Control Council is to provide advice and recommendations to the Minister. In some circumstances, the Environmental Control Council holds inquiries or hearings. An important function of the Environmental Control Council is to conduct environmental assessment hearings pursuant to the *Environmental Assessment Act*.

1. Permits to Pollute

The principal regulatory mechanism under the *EPA* is to require a permit for any person who owns, occupies, operates or "is responsible for" any undertaking or thing that discharges waste into the environment or otherwise causes or tends to cause

pollution. (s. 23) Her Majesty the Queen in right of the Province, together with Provincial corporations, agencies, officers, servants and employees are required to obtain permits to pollute. [s. 50(1)]

The Act, however, does not apply to accepted ordinary activities of individuals, households and farms. [Section 50(2)]

In *R. v. Irving Oil Co. Limited* (1981), 45 N.S.R. (2d) 438 (N.S. Co. Ct.) Anderson, J. considered on the evidence that oily water was neither "waste" nor caused pollution within the meaning of the Act. The Court suggested that "waste" would have to be a by-product of some manufacturing, industrial or agricultural process. Pollution charges under s.23 were held to be strict liability offences.

3. Ministerial Control Orders

Section 26 provides that the Minister may issue a Ministerial Order against a person who owns, operates or is responsible for the operation of a plant, structure, facility, an undertaking or thing that the Minister, on reasonable and probable grounds, believes is causing pollution.

The broad range of orders ("control orders") which the Minister may issue includes cessation of the contravention, elimination of the discharge of waste in the environment and remedial action to eliminate or mitigate the cause of pollution. The Minister is authorized, where it is in the public interest, to do all things and take all necessary steps to repair any injury or damage. Where the Minister believes there is an immediate danger to human life, to the health of a person or property or a likelihood of irreparable or irreversible damage to the environment, the Minister may order ("stop orders") a plant to be shut down either permanently or for a specified period of time.

It is an offence to fail to comply with a Ministerial Order. [Section 26(5)] Due diligence is a defence available to an accused charged with failing to comply with a Ministerial Order. In *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237, (N.S. Prov. Ct.) Curran, J. acquitted the accused on one count upon the basis that it was impossible for the accused acting with due diligence to comply within the time limit imposed by the Minister in the Ministerial Order requiring clean-up of a contaminated site. The Court also held it was not inclined to second guess the Minister's grounds for issuing the Ministerial Order.

In recent years, approximately 15 Ministerial Orders have been issued annually. See Tab 10.

When the person named in a Ministerial Order fails to do remedial work required under the order, the Minister may undertake the work and sue to recover the expenses and costs incurred. [s. 26(2)] All Ministerial Orders must be referred to the Environmental Control Council or the Executive Committee of the Council. (s.27) They are also filed as regulations with the Registrar of Regulations under the *Regulations Act*, R.S.N.S. 1989, c.393.

3. Orders under other Acts Administered by the Department of the Environment

Under s. 36 of the *EPA*, every order, requirement, permit or license given, made or issued pursuant to the *Water Act*, R.S.N.S. 1989, c. 500, or any other Act under the administration of the Department of Environment is deemed to be made under the *EPA* and continues in force until revoked, suspended or varied by the Minister.

4. Appeals

The *EPA* provides for a wide range of appeals to the County Court. See Tab 12. Appeals may be brought by a person who is aggrieved by:

1. a regulation made under the *EPA*;
2. the refusal of the Minister to grant or issue a permit;
3. the suspension or cancellation of a permit;
4. the granting of a permit by the Minister subject to terms and conditions;
5. the issuance or variation of a control order;
6. the issuance or amendment of a stop order;
7. the refusal of the Minister to approve plans or specification for a proposed or altered facility;
8. an order by the Minister to take remedial action to control pollution.

The appeal may be brought on a question of law or fact or a mixed question of law and fact.

In the *Margaree Environmental Association v. The Minister of the Environment* (an unreported decision of Judge Anderson, dated September 14, 1988), an appeal was dismissed upon the basis that the appellant was not "a person aggrieved". The Court held that an

aggrieved person must show it had suffered a legal grievance, had a decision pronounced which wrongfully deprived it of something or wrongfully refused it or wrongfully affected its title to something. The Appeal Division dismissed an appeal from this decision for other reasons. [1989], 96 N.S.R. (2d) 312.

In holding the appellant not to be "a person aggrieved", Judge Anderson relied upon the decision of the Appeal Division in *Halifax Atlantic Investments Limited v. The City of Halifax* (1978), 28 N.S.R. (2d) 193. Less restrictive judicial interpretations of the phrase "a person aggrieved" may, however, be found. See *Attorney General of Gambia v. N'Jie*, [1961] 2 All E.R. 504, *Maurice v. London City Council*, [1964] 2 Q.B. 378.

In the *Margaree Environmental Association* case it was argued that the appeal rights afforded under s.53 of the *EPA* pertained only to orders and permits under the *EPA* and not to orders and permits under other acts administered by the Department. This point was not decided by either the County Court or Appeal Division.

Under s.53 the decision of the County Court Judge is expressed to be "final and binding" on the Minister and on the appellant who are required to take such action as is necessary to implement the decision. There is no appeal from a decision of the County Court Judge to the Appeal Division. See *Tidewater Construction Co. v. Nova Scotia* (Minister of the Environment) (No. 1) (1986), 77 N.S.R. (2d) 368.

A decision of a County Court Judge pursuant to s. 53 of the *EPA* is reviewable by the Trial Division by way of certiorari for error of law in the face of the record and for jurisdictional error. See *Tidewater Construction Co. v. Nova Scotia* (Minister of the Environment) (No. 2) (1987), 77 N.S.R. (2d) 372.

An appeal from a Ministerial Order pursuant to Section 53 of the *EPA* does not act as a stay of execution (*Lawrence and Florence Hart v. Nova Scotia* (Minister of the Environment), an unreported decision of Judge Hiram Carver, County Court, dated July 24, 1991). A stay may be granted if the appellant meets the factors identified in *A.G. of Manitoba v. Metropolitan Stores* (1987), 38 D.L.R. (4th) 321 (S.C.C.):

(a) there is a serious issue to be tried;

(b) without the stay, the applicant will suffer irreparable harm not compensable by damages; and

(c) the balance of convenience is in favour of granting a stay.

5. Inspectors

Inspectors are appointed pursuant to s. 42 and 43 of the *EPA*. See **Tab 8**. Inspectors have the power to enter upon land and to conduct a search (other than a private dwelling) upon reasonable and probable grounds that waste is being discharged or pollution caused. Environmental enforcement officers are appointed "special constables" under the *Police Act*, R.S.N.S. 1989, c. 348, s. 43. See Chapter IV.

B. *Water Act*, R.S.N.S. 1989, c.500

The *Water Act* vests all "watercourses" in Her Majesty in Right of the Province. The Minister of the Environment has general supervision of all watercourses (s. 10), approves water works, sewage works, alterations to watercourses and the depositing of polluting material in a watercourse.

1. Watercourses

"Watercourse" is broadly defined as the "bed and shore of every river, stream, lake, creek, pond, spring, lagoon, swamp, marsh, wetland, ravine, gulch, or other natural body and the water therein including groundwater within the jurisdiction of the Province whether it contains water or not". This definition was enacted in 1972. Prior to that date, the definition was more restricted.

In *Corkum v. Nash* (1990), 71 D.L.R. (4th) 390 (confirmed N.S.C.A. November 19, 1991 unreported) Mr. Justice Davison held that the term "watercourse" did not include a harbour. The trial judge did not decide whether interior bodies of water which are tidal in nature or brackish qualify as watercourses.

In construing the definition of watercourse, the judge referred to a number of principles of statutory interpretation including the presumption that the legislation does as little to interfere with existing rights as possible in effecting the objects of legislation, the presumption against alteration of common law and the principle that statutes which encroach on property rights should be construed strictly.

It would appear that the bed and shore of a manmade or artificial body of water may not constitute a "watercourse". The Courts do not appear to make the distinction where the artificial body of water has existed over a long period of time.

In *Corkum v. Lohnes* (1981), 43 N.S.R. (2d) 477 (N.S.C.A.), Mr. Justice Cooper on behalf of the Court expressed the obiter view that percolating water may be included as groundwater in the definition of "watercourse". The judge also stated that the Act did not vest in the Crown all water percolating at random below the surface of the ground if the percolating water was not below a "bed or shore". The ownership of the groundwater was not, however, necessary to the decision of the Appeal Division which held that while a landowner at common law had an unlimited right to draw from and use groundwater, there is no right to pollute the groundwater.

2. Ministerial Orders

The Minister of the Environment may make Ministerial Orders requiring persons to comply with the Minister's directions where he is satisfied that the action is necessary to protect a watercourse or the beneficial use of a watercourse. (s. 9) If the person fails to comply with the Ministerial Order, the Minister can do remedial work and sue to recover costs and expenses. Section 36 of the *Environmental Protection Act* applies to Ministerial Orders issued under the *Water Act*. These Ministerial Orders are referred to the Environmental Control Council or the Executive Committee of the Council.

The Minister may also order alterations or additions to water works and sewage works.

Failure to comply with a Ministerial Order is an offence under s.20 of the *Water Act*. See *R. v. Nicholl* (1971), 14 Cr. L.Q. 102 per O'Hearn, Co. Ct. J.

3. Polluting the Watercourse

It is an offence under s.15 of the *Water Act* to discharge or deposit without the approval of the Minister material into a watercourse which may cause pollution or impair the quality of the water for beneficial use.

In *R. v. Joi-Terra Farms Limited* (1987), 79 N.S.R. (2d) 203 (N.S. Co. Ct.), Haliburton, J. held that it was not incumbent upon the prosecution to satisfy the Court beyond a reasonable doubt that the material did in fact impair the water but rather that it had the "ability" to do so. See also *R. v. Satellite Construction Limited*, (N.S. Prov. Ct., unreported decision of April 2, 1992).

An offence under s. 15 of the *Water Act* is a strict liability offence for which due diligence provides a defence. Whether or not the accused has exercised all due diligence is a question of fact.

See also, *R. v. Aberdeen Paving Limited* (1981), 45 N.S.R. (2d) 344 (N.S.C.A.).

4. Diversion of Watercourses

It is an offence to divert or alter a watercourse without the approval of the Minister. The *Water Licence and Permit Regulations* (O.I.C. 90-313, N.S. Reg. 95/90) exempts certain activities from the requirement of a permit or approval. The most significant exemption is the continuous use of less than 23,000 litres (5,000 gallons) of water per day from obtaining a license or permit. All exemptions are subject to the important qualification that the withdrawal of water from a watercourse may not cause damage to fish or a wildlife habitat.

5. Enforcement

Orders, requirements, permits or licenses issued under the *Water Act* are deemed by s. 36 of the *EPA* to be made under the *EPA*.

6. Clean Water Task Force

In June, 1991, the Minister's Task Force on Clean Water delivered its final report. Among other things, it recommended a new *Water Resources Act* to replace the existing *Water Act* which was enacted in 1919. One lead agency to deal with water matters was also recommended by the Task Force.

C. *Pest Control Products Act*, R.S.C. 1985, c. P-9

1. Federal Legislation

The main federal piece of legislation dealing with pesticides is the federal *Pest Control Products Act*, R.S.C. 1985, c.P-9. This Act is administered by Agriculture Canada and is binding on both the federal and provincial Crown. Under the Act, the use, storage, display, manufacturing, or distribution of pesticides under unsafe conditions is prohibited. The main purpose of this legislation is to approve the use of pesticides, and to require registration and proper labelling indicating the approved uses of a particular pesticide.

Under the regulations, the Minister must register pesticides used or sold in Canada. Scientific information to be submitted in support of a registration application can be specified. Finally, the use of pesticides inconsistent with the label can be prohibited by regulation.

2. Provincial Legislation

(a) General

The *Pest Control Products (Nova Scotia)* Act, R.S.N.S. 1989, c.341, unlike the federal legislation, provides for the licensing of the use and storage of pesticides. This is considered a supplement to the federal control of use. Regulations can be passed under the Act dealing with conditions which apply to licences for the sale, use, handling, storage, transportation and disposal of pest control products.

(b) Inspector's Powers

An inspector is designated by the Minister of the Environment and appointed pursuant to s. 24. Under s. 19(1), an inspector may direct any person storing or transporting a pest control product to take action, as directed, to avoid contamination by the pest control product. Section 19(2) makes it an offence to fail to comply with the direction of an inspector.

(c) Ministerial Orders

The Minister has the supplementary power to cause remedial action to be taken where contamination is caused by the failure of a person to comply with the Act or regulations, or through negligence. Such remedial action can be required by a Ministerial Order under s.23(1). If remedial action is not taken by the person responsible, the Minister can take action to eliminate the problem under s. 23(2) and recover the costs from a bond or other security referred to in s.14 and go to Court to recover any other costs. [s.23(4)]

(d) Regulations

The regulations passed to date deal with the granting of licences and permits, and storage of pest control products. The *Pest Control Products Permit and Licence Regulations* provide for seven classes of licences to be issued (s.4, O.I.C. 89-674, N.S. Reg. 80/89), and specify conditions for the granting of a permit (s.10, O.I.C. 89-674 N.S. Reg. 80/89). The *Pesticide Storage Regulations* provide for the storage and handling of pest control products in buildings. Other regulation making powers are provided for in s. 30 of the Act.

D. *Dangerous Goods and Hazardous-wastes Management Act*, R.S.N.S. 1989, c.118 as amended by S.N.S. 1990, c.27.

1. General Overview

(a) **Public Highways:** The *Dangerous Goods Transportation Act*, R.S.N.S. 1989, c.119, administered by the Department of Transportation and Communications covers the transportation of "dangerous goods" and "hazardous wastes" on the public highways in the Province.

(b) **Federal Act:** The federal *Transportation of Dangerous Goods Act*, R.S.C. 1985, c.T-19 ("TDGA") and *Transportation of Dangerous Goods Regulations* apply to transportation of such goods across Canada. The provincial regulations adopt, mutatis mutandis, most of the federal regulations.

(c) **Department of Environment Legislation:** The *Dangerous Goods and Hazardous-wastes Management Act* ("DGHMA") covers storage on private property of dangerous goods and hazardous wastes.

2. The *Dangerous Goods and Hazardous-wastes Management Act*

This Act supplements the Nova Scotia *Dangerous Goods Transportation Act* (DGTA) which operates in conjunction with the federal *TDGA*. The *Dangerous Goods and Hazardous-wastes Management Act ("DGHMA")* only applies where the DGTA has no application. Whereas the DGTA is administered by the Department of Transportation and Communications, the DGHMA is administered by the Department of the Environment. Under this Act, ordinary activities of individuals, households, and farms are exempt, unless they are specifically prescribed by the Governor in Council. The Act otherwise applies to the handling of dangerous goods for any purpose, and the handling of hazardous wastes by any person responsible for it. Dangerous goods and hazardous-wastes are defined in various regulations on specific substances, such as asbestos, PCBs, waste oil and petroleum products.

3. Federal Legislation

Federal legislation, which may deal with the same subject matter as the *DGHMA*, other than the federal *Transportation of Dangerous Goods Act* referred to above, includes the *Canadian Environmental Protection Act* and the *Fisheries Act*. Specific regulations passed under those Acts which may overlap with the provincial Act include: spill reporting regulations, hazardous waste management regulations for federal facilities, PCB storage regulations, pulp and paper effluent regulations, export and import of toxic substances

regulation, and ocean dumping regulations, all administered by Environment Canada.

4. Application of *Environmental Protection Act*, R.S.N.S. 1989, c. 150 ("*EPA*")

Under s. 8A of the *DGHMA*, a number of provisions of the *EPA* have been adopted. These include provisions for the appointment of inspectors, the powers of an inspector, the furnishing of information to an inspector and the carrying out of tests and examinations as required by an inspector. The *EPA* also applies with regard to the hindering or obstructing of an inspector in the lawful performance of the inspector's duties, the furnishing of false information to an inspector and the refusal to furnish information to an inspector. Finally, provisions for an order by the Minister and the failure to comply with such an order in the *EPA* also apply to this Act.

5. Regulations

(a) ***Dangerous Goods Storage Regulations*** (O.I.C. 89-768, N.S. Reg. 97/89 as amended by O.I.C. 89-802, N.S. Reg. 137/89)

The *Dangerous Goods Storage Regulations* were passed pursuant to s. 12 of the *DGHMA*. "Dangerous goods" for purposes of these regulations are as defined in the *Transportation of Dangerous Goods Act* of Canada. Section 5 of the regulations exempts goods which are covered by other regulations made under the Act or by other provincial legislation such as the *Pest Control Products (Nova Scotia) Act*.

The regulations require any person wishing to store waste dangerous goods to obtain written approval from a designated official of the Department of the Environment. Other requirements for storing dangerous goods or waste dangerous goods (ie, hazardous-wastes) include proper labelling of goods, securing goods from public entry, prominently identifying storage facility, and proper training of employees.

The regulation also limits the quantities of waste dangerous goods to be stored, and allows the Director to limit the time during which such goods can be stored. Other provisions provide for emergency response, security, and inspections of the facility. Spill reporting requirements are outlined in s.15 and the volumes involved are prescribed in Schedule "A" to the regulations.

(b) ***Petroleum Storage Regulations*** (O.I.C. 88-163, N.S. Reg 33/88 as amended by O.I.C. 88-867, N.S. Reg. 180/88 and O.I.C. 91-594, N.S. Reg. 109/91).

These regulations designate petroleum as a dangerous substance under the Act. They then set out the requirements for approval of a petroleum storage facility, establish minimal requirements which have to be met by all facilities, allow for inspections, and provide for mandatory spill reporting.

In *R. v. Gordon's Greenhouse Limited*, the accused company was convicted of failing to report a spill under s.10(1)(a) of these regulations. In an unreported decision on June 12, 1991, Crawford, Prov. Ct. J. fined the company $4,500. The fine would have been higher had not the company spent $60,000 - $70,000 on the clean up.

The regulations further provide for tank registration of facilities above a certain size, installation of tanks, and minimum construction and installation standards. Further, it provides for inventory control, alterations and maintenance of storage facilities, and abandonment of storage tank systems.

(c) ***Asbestos Waste Regulations*** (O.I.C. 90-866, N.S. Reg. 197/90)

Asbestos is another dangerous substance singled out for a separate regulation. This regulation provides for the removal of asbestos from buildings and structures, safety equipment to be used in handling asbestos, and packaging and shipping requirements. Finally, the regulation provides for special disposal sites approved by the director. In *R. v. Mechanical Engineering Limited*, the accused plead guilty to a charge under s.9 of these regulations with unlawfully transporting or disposing of asbestos waste which was not wetted or packaged as required by the regulations. On May 7, 1991, Oxner, Prov. Ct. J. fined the company $2,000.

(d) ***PCB Storage Regulations*** (O.I.C. 88-1233, N.S. Reg. 225/88)

These regulations require persons storing PCBs to register with the Department. Precautions for the storage of PCBs are prescribed. Persons storing PCBs are required to keep accurate records and meet reporting requirements. The regulations permit inspectors to enter and search PCB storage sites.

(e) ***Waste Oil Regulations*** (O.I.C. 90-867, N.S. Reg. 198/90)

These regulations deal with the handling of waste oil and contaminated waste oil. Section 13 outlines spill reporting volumes and clean up requirements. No person can apply waste oil as a dust suppressant on roads.

E. *Environmental Assessment Act*, R.S.N.S. 1989, c.149

The *Environmental Assessment Act* introduces to the Province the procedures of environmental self assessment and public review for "undertakings" which, in the opinion of the Minister, may have a significant environmental impact. Environmental assessments and public reviews may be required not only for new projects but also for the modification, extension, abandonment, demolition and rehabilitation of existing projects. The written approval of the Minister is required before a proponent may proceed with an undertaking. (s. 13)

It is an offence to contravene the *Environmental Assessment Act*. (s.19) The fines may not exceed $50,000 for a first offence and $75,000 for a second or subsequent offence. Each day in which the contravention occurs constitutes, however, a separate offence.

F. Air Legislation

1. *Ozone Layer Protection Act*, R.S.N.S. 1989, c. 331

The Act prohibits any manufacture, sale, offer for sale, or use of any substance identified by regulation as damaging or tending to damage the ozone layer. The time after which such use of a designated substance shall be prohibited is also to be set in the regulations. A contravention of the Act or regulations can result in a maximum fine of $50,000 or one year imprisonment in default of payment or both, and a maximum of $75,000 or two years imprisonment in default of payment or both for any subsequent offence. Each day of a continuous contravention constitutes a separate offence. Regulations on ozone layer depleting substances (SOR/89-351) similar to those passed under this Act were established pursuant to the *Canadian Environmental Protection Act* in June of 1989, setting federal standards for the elimination of ozone depleting substances.

The *Ozone Layer Protection Regulations* (O.I.C. 91-41, N.S. Reg. 8/91) made under the provincial Act, which came into force on February 15, 1991, designate five CFCs, three halons, and Methyl Chloroform as "damaging substances". The regulation also provides for the appointment of inspectors, and prohibits specific uses of "damaging substances" such as in fire extinguishers, pressurized containers, coolants, packaging materials, and insulation foam.

2. ***Municipal Waste Incinerator Regulations*** (O.I.C. 90-242, N.S. Reg. 88/90)

These regulations established under the *Environmental Protection Act*, R.S.N.S. 1989, c. 150, govern the operation of municipal waste incinerators. Municipal waste includes rubbish and garbage from residential, commercial and industrial sources, but does not include any waste designated as hazardous waste or a biomedical waste under any federal or provincial Act or regulations. The regulation provides for stack emission standards, ambient air quality objectives and combustion gas residence time. Open burning of municipal waste is prohibited after January 1992, unless by permit. Such permits for open burning may not extend beyond January 1, 1996.

3. ***Biomedical Waste Incinerator Regulations*** (O.I.C. 88-1406, N.S. Reg. 252/88)

These regulations set up under the *Environmental Protection Act*, R.S.N.S. 1989, c. 150, control the operation of biomedical waste incinerators, including incinerators at hospitals, veterinary facilities and crematories which burn biomedical waste. Biomedical waste includes infectious waste and pathological waste. The regulation sets out the procedure to be followed to obtain an operating permit for any such facility. In general, information required includes the location of the incinerator, technical details, type and amount of waste handled, and any other information requested. A decision will then be made as to whether to issue the permit.

4. ***Gasoline Volatility Regulations*** (O.I.C. 90-527, N.S. Reg. 120/90)

These regulations established under the *Environmental Protection Act*, R.S.N.S. 1989, c.150, control the refining and importing of gasoline. The regulations allow a maximum Reid Vapour Pressure of 72 kilopascals for any gasoline refined in Nova Scotia or imported for use in Nova Scotia.

5. **Minister's Task Force on Clean Air**

The Task Force submitted an interim report in December of 1991 on the submissions made by the public in the course of seven public meetings in May and June of 1991. The Final Report will address the current air quality situation in Nova Scotia, the existing policy and regulatory framework, and options and recommendations for improvements to current air policy planning and management.

IV. ENVIRONMENTAL INSPECTIONS AND INVESTIGATIONS

A. Appointment and Duties of Inspectors and Investigators

Broad powers exist under the Nova Scotia statutes with respect to the entry on to private property for inspection and enforcement purposes and the retrieval of information, samples and test results.

By Memorandum dated July 5, 1991, the Minister of Environment appointed as inspectors persons holding certain designated job classifications within the Department of the Environment. See **Tab 8**. These persons became inspectors under the *EPA*, the *Pest Control Products (Nova Scotia) Act*, R.S.N.S. 1989, c. 341, the *Dangerous Goods and Hazardous-wastes Management Act*, R.S.N.S. 1989, c. 118, the *Water Act*, R.S.N.S. 1989, c.500, and the *Well Drilling Act*, R.S.N.S. 1989, c.502. Inspectors are granted powers to perform inspections under all environmental legislation administered by the Department of the Environment from time to time.

Certificates evidencing this authority are issued by the Department to individuals who serve as inspectors. These certificates are available for presentation by inspectors carrying out their duties.

Environmental enforcement officers in the employ of the Department are also designated as "special constables" under Section 43 of the *Police Act*, R.S.N.S. 1989, c.348. This appointment makes the enforcement officers peace officers under the *Criminal Code*.

Inspectors are "*peace officers*" as defined in Section 785 of the *Criminal Code* but the are not police officers. [See *Police Act*, also *R. v. Renz (1972), 10 C.C.C. (2d) 250 (Ont. C.A.)*].

B. Specific Statutes

1. The *Environmental Protection Act*, R.S.N.S. 1989, c. 150:

s.42 The Minister may appoint the inspectors necessary for the administration of this Act and the regulations.

The *EPA* defines "inspector":

s.3(h) "inspector" means a person designated by the Minister for the purposes of this Act or the regulations.

The powers of inspectors so appointed, the obligations of other parties and the consequences of non-cooperation are set forth in s. 43 of the *EPA* which provides:

> s.43(1) An inspector at any reasonable time and upon presentation of a certificate or other means of identification provided by the regulations for the purpose of enforcing this Act may:
>
> (a) enter and search an area, place or premises other than a private dwelling in or from which he reasonably believes waste is being produced, discharged or emitted or pollution caused;
>
> (b) make or require to be made such examinations, tests and inquiries as may be relevant to the subject-matter of the investigation.
>
> (2) Every person responsible for a source of waste shall furnish such information or carry out such tests and examinations as an inspector requires for the purposes of the Act or the regulations.
>
> (3) No person shall hinder or obstruct an inspector in the lawful performance of his duties or furnish an inspector with false information or refuse to furnish him with information.

2. Pest Control Products (Nova Scotia) Act, R.S.N.S. 1989, c.341

The Supervisor and inspectors under the *Pest Control Products (Nova Scotia) Act* may at any reasonable time and upon presentation of a certificate or other means of identification for the purpose of enforcing the *Pest Control Products (Nova Scotia) Act* and regulations:

> s. 24(2) (a) enter and search an area, place of premises other than a private dwelling in or from which he reasonably believes pest control products are being sold, used, handled, stored, transported or disposed;
>
> (b) make or require to be taken or made such samples, tests, examinations and inquiries as may be relevant to the subject-matter of the investigation;

(c) examine any books, records, registers or documents concerning any matter within the provisions of the Act and the regulations;

(d) direct that certain actions be taken to bring an activity within the provisions of the Act and regulations.

(3) Every person involved in the sale, use, handling, storage and disposal of pest control products shall furnish such information as the Supervisor or an inspector requires for the purpose of the Act and the regulations.

3. *Dangerous Goods and Hazardous-wastes Management Act*, R.S.N.S. 1989, c.118

The *Dangerous Goods and Hazardous-waste Management Act* incorporates by reference in s.8A the provisions of the *Environmental Protection Act* respecting appointment of inspectors, powers of inspectors, furnishing of information to inspectors, the carrying out of tests and examinations as required by an inspector, and orders by the Minister.

4. *Water Act*, R.S.N.S. 1989, c.500

Inspectors under the *Water Act* may enter into and upon lands or buildings used for commercial, industrial or public purposes and may make such investigations as they deem necessary. (s. 19)

5. *Well Drilling Act*, R.S.N.S. 1989, c.502

Inspectors under the *Well Drilling Act* may enter business premises of licensed well drillers and any premises upon which the licensed well driller is engaged in well drilling and may examine and inspect the records and equipment and the operation of the well drilling. (s. 9)

C. Inspections and Searches

1. *Charter*

Section 8 of the *Charter* provides:

> *Everyone has the right to be secure against unreasonable search or seizure.*

There is a distinction to be drawn between an administrative inspection and a search and seizure.

2. *Hunter* Case

The leading case on s. 8 of the *Charter* is *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (sometimes referred to as *Hunter v. Southam*). In this case, the Supreme Court of Canada outlined the tests under which a search and seizure may be struck down as a contravention of s.8 of the *Charter*.

The Supreme Court of Canada directed that a person relying on s. 8 of the *Charter* must establish a reasonable expectation of privacy. Once the subject of the search has established that, in effect a rebuttable presumption of unreasonableness applies in respect of warrantless searches. The onus shifts to the authority to show:

(a) a system of prior authorization by an entirely neutral and impartial arbiter capable of acting judicially in balancing the interests of state against those of the individuals;

(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of a particular offence under investigations will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

3. Administrative Inspections

Subsequent cases have distinguished administrative inspections from search and seizure. Factors which are relevant in identifying an administrative inspection include:

(a) the routine nature of the inspection;

(b) the minimal intrusion into the privacy of a person; and

(c) the inspection as part of the enforcement of a regulatory regime.

4. Regulatory Searches

In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, the Supreme Court of Canada authorized a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures. In effect, the privacy which a citizen can reasonable expect may vary significantly depending upon the activity that brings the citizen into contact with the state. This point was also emphasized in *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.).

In *R. v. Kent (1991), 102 N.S.R. (2d) 181 (Co.Ct.)*, Palmeter, C.J., held that a lobster fisherman licensed under the *Fisheries Act* and regulations did not have a reasonable expectation of privacy with respect to inspections by fisheries officers for contravention of the *Fisheries Act*. This decision was affirmed on appeal (decision of N.S.C.A., A.D., October 17, 1991).

5. Inspection/Investigation

The Courts have not yet clearly defined the circumstances under which an administrative inspection for which no warrant is required may become an investigation for which a warrant is necessary. One approach is that of Haliburton, J. in *Sable Fish Packers (1988) Limited v. R.*, Nova Scotia County Court (May 30, 1991, Haliburton, J. unreported (1990) C.F.B. No. 3063). Judge Haliburton noted that inspections as an administrative function may be carried out as a simple matter of routine, or as a matter of regularity, and equally so where there is a suspicion of non-compliance. It is only where the investigation takes on a different character, where it may be said to have a quasi-criminal character that the full force of s.8 of the *Charter* and the "*Hunter* criteria" come into play. Where there is reason to believe that an offence has been committed and it has been sought to collect evidence, a search warrant ought to be obtained. If, however, there is not sufficient information to justify the obtaining of a search warrant but the inspector has a "suspicion" of an offence, the inspector may nevertheless conduct an inspection under the *Fisheries Act*.

D. Search Warrants

It appears that an inspection or warrantless search may take place under environmental legislation so long as the inspector is not conducting an inspection to investigate an offence which on reasonable and probable grounds, the inspector believes has been committed. In these circumstances, the *Hunter* case factors apply and a warrant is required.

In 1990 the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, was amended by the introduction of s.2A-2F to permit peace officers and persons charged with the enforcement of an enactment to search pursuant to warrants issued by a justice.

The warrants may authorize an enforcement officer to search and seize items located in a building, receptacle or place. (s.2A)

The warrant must be issued by a justice who has been satisfied on the basis of sworn information that there are reasonable grounds to believe that the place contains anything in respect of which an offence has been committed or is suspected to have been committed or else will afford evidence with respect to the commission of an offense. The warrant may authorize the inspector to search the building for any such thing, to seize it and to bring the seized thing to justice and to make a report. (s. 2B)

Unless otherwise authorized, a search warrant must be exercised between 8:00 o'clock in the morning and 9:00 o'clock in the evening. (s.2C)

While in the course of executing a warrant, the inspector may seize in addition to the things mentioned in the warrant anything that on reasonable grounds the inspector believes has been obtained by or used in the commission of an offence. (s. 2D) The *Summary Proceedings Act* contains provisions with respect to the forfeiture and detention of things seized pursuant to a warrant. It is possible under the Act, as well, to make application for an order requiring the seized thing to be returned to the applicant. [s. 2F(6)]

E. The Plain View Doctrine

Under the "plain view doctrine" it has been held that when evidence falls into the view of an officer who has a right to be in the position he is in to have the view he has had, that evidence is

subject to seizure. In order to be subject to the "plain view doctrine" the following conditions must be met:

1. the initial intrusion must be lawful;

2. the incriminating evidence must have been inadvertently discovered, that is, the doctrine does not apply if the officer knew in advance that the evidence was in a particular location and intended to rely upon the plain view principle as a pretext to seize it; and

3. the incriminating nature of the items seized must be "immediately apparent" to the officer.

The initial intrusion may be pursuant to a warrant, a valid warrantless search, or a search incidental to an arrest. [see J. Fontana, *The Law of Search and Seizure in Canada* (3rd Ed. Butterworths 1992) page 602; *R. v. Shea* (1982), 1 C.C.C. (3d) 316 (Ont. H.C.); *Chic Fashions (West Wales) Ltd. v. Jones,* [1968] 2 Q.B. 299 (C.A.)]

The plain view doctrine has not yet been held to apply to inspections under environmental offences. There is no reason in principle why it should not. In *R. v. Bata Industries Limited et al.* (an unreported decision of His Honour Judge Edward F. Ormston of the Ontario Court of Justice (Provincial Division) delivered February 7, 1992), the evidence obtained to secure the conviction was obtained by the officers as having been in their plain view while lawfully entering the premises on unrelated business.

In *R. v. Safety-Kleen Canada Inc.*, unreported, [1991] O.J. NO. 1867 action number 3120/91 October 7, 1991, Mr. Justice Salhany of the Ontario Court of Justice (General Division), held that the plain view principle did not apply to provincial offences. At issue was a prosecution under the *Environmental Protection Act*, R.S.O. 1980, c. 141, and documents seized which were not listed in the warrant. Salhany, J. expressed concerns, as well, as to the circumstances in which the "plain view doctrine" could apply to documents.

F. Mandatory Notification: Protection Against Self Incrimination

Under s.43(2) of the *EPA* every person responsible for a source of waste is required to furnish information or carry out such tests and examinations as an inspector requires for the purposes of the

Act or the regulations. Other environmental acts and regulations contain similar provisions.

The question arises as to whether information obtained in this fashion may be used in a prosecution under the statute pursuant to which the information was given. In *R. v. Weil's Food Processing Limited* (1992), 6 C.E.L.R. (N.S.) 249, Mr. Justice Browne of the Ontario Court of Justice (General Division) held that provisions of the Ontario *Environmental Protection Act* and Ontario *Water Resources Act* requiring notice of discharge to be given to the Ministry of Environment remained in full force and effect notwithstanding the provisions of s. 7 of the *Charter*. The mandatory notice provisions were unconstitutional only to the extent that notice could be used against the giver. Accordingly, this section should be interpreted as providing that the notice may not be used against the giver. See also *R. v. Bata Industries Limited, supra*.

G. False Information and Obstruction

It is an offence to hinder or obstruct an inspector in the lawful performance of his duties, to furnish an inspector with false information, or to refuse to furnish an inspector within information. (s. 43(3) *EPA*) Similar provisions exist under the *Pest Control Products (Nova Scotia) Act* (s. 24) and the *Criminal Code*. (s. 129)

There need not be any physical contact in order to amount to an obstruction. Saying something or failing to act may amount to an offence. (*R. v. MacPherson* (1977), 24 N.S.R. (2d) 102 (S.C.A.D.) The obstruction does not need to frustrate completely the officer's accomplishment of his duties. It is sufficient that it "affected" the constable in the execution of a duty he was then executing. See *R. v. D'Entremont* (1931), 57 C.C.C. 174 (N.S.S.C.A.D.).

In *R. v. Vandervoet* (1986), 26 C.R.R. 173 (Ont. Prov. Ct.) it was held that s. 129 of the *Criminal Code* did not violate s. 7 of the *Charter*. The Court will look at the degree or necessity of need to know and the severity of the inconvenience and the scope of the duty on the individual. The Court held that the object and scope of the Ontario *EPA* was of great public concern and consequently demanded a high degree of public cooperation, particularly where the reporting requirements were not so onerous or prejudicial as to excuse a citizen from complying.

It is noteworthy that in *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, the Supreme Court of Canada recognized the

basis for differential treatment of regulatory offences. There is an implied term that a regulated industry will comply with and maintain a certain minimum standard of care.

Section 47 of the *EPA* makes it an offence to give false information in an application, report, return or statement made to the Minister.

H. Summary Offence Tickets

The ticketing scheme set up under the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450 applies with respect to the following environmental statutes and regulations:

Environmental Protection Act
Pest Control Products (Nova Scotia) Act
Water Act
Dangerous Goods and Hazardous-wastes Management Act
Well Drilling Act
Litter Abatement Act
General Litter Abatement Regulations
Asbestos Waste Regulations
Dangerous Goods Storage Regulations
Waste Oil Regulations

Summary offence tickets are to be issued when the investigating officer believes a minor offence has occurred. There are no administrative penalties provided in Nova Scotia.

V. ENVIRONMENTAL PROSECUTIONS

A. Policy Statement

On June 14, 1991, the Minister of Environment issued a Uniform Enforcement Policy statement with respect to the handling of environmental prosecutions. See Tab 9.

B. Categorization of Offences

The vast majority of environmental offences will be categorized as trict liability offences as defined in *R. v. Sault Ste. Marie* (City) (1978), 40 C.C.C. (2d) 353 (S.C.C.). The three categories of offences as originally outlined in *R. v. Sault Ste. Marie* are as follows:

1. Offences in which *mens rea* consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*. The doing of the prohibited act *prima facie* imports the offence, leaving it opened to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. A defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may be properly called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

The offence created under s. 15 of the *Water Act*, R.S.N.S. 1989, c.500 (discharge of pollutant into a watercourse without Ministerial approval) has been held by the Nova Scotia Supreme Court Appeal Division to constitute a strict liability offence. See *R. v. Aberdeen Paving Limited* (1981), 45 N.S.R. (2d) 344 (S.C.A.D.)

In some circumstances environmental offences and other similar regulatory offences may nevertheless be categorized as *mens rea* offences where the offence by its nature requires proof of a certain mental state, for example, where the accused must have "knowingly" or "wilfully" committed a certain act (*R. v. Sault Ste. Marie, supra*, p. 375). However, the Crown is not otherwise required to establish *mens rea* in the case of strict liability offences even where such offences are punishable by imprisonment (*Wholesale Travel Group Inc., supra*).

C. Burden of Proof

In all cases the *actus reus* of the offence ("persuasive burden") must be proved beyond a reasonable doubt.

In strict liability offences, the burden then shifts ("evidential burden") to the accused to establish due diligence in either of the two forms referred in *R. v. Sault Ste. Marie, supra*:

1. reasonable belief in a mistaken set of facts which, if true, would have rendered the Act or omission innocent; or

2. the taking of all reasonable steps to avoid the particular event.

The constitutionality of the shifting of the burden to the accused has been upheld by the Supreme Court of Canada in *Wholesale Travel Group Inc., supra*.

D. Elements of the Offence

Prosecution of environmental offences typically require the proof of a number of elements of the *actus reus*. These elements must be carefully extracted from the words of the charging section in the context of the applicable statutory definitions.

The definition of "waste" as contained in the *Environmental Protection Act*, R.S.N.S. 1989, c. 150 ("*EPA*") was given detailed consideration by the County Court in *R. v. Irving Oil Company Limited* (1981), 45 N.S.R. (2d) 438.

A number of offences under Nova Scotia statutes contain exceptions relating to ministerial approval or existence of permits. For example, the offence created under s. 15 of the *Water Act* contains

the exception "unless approved by the Minister" and the s. 23 *EPA* offence for discharging pollution contains the exception "unless he has obtained a permit from the Minister". In cases of exceptions of this nature, it is not necessary that the Crown establish the absence of an exemption in order to prove the offence (*R. v. D.M.H.* S.C.C. 02451, October 10, 1991, N.S.C.A.). See also *R. v. Irving Oil Limited, supra*.

E. Limitation Periods

The Nova Scotia environmental legislation does not establish specific time limitation periods within which charges must be laid.

Pursuant to s.7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c.450, the provisions of the *Criminal Code*, both substantive and procedural, applicable to summary conviction offences are rendered applicable to proceedings under the *Summary Proceedings Act*, in turn encompassing virtually all offences existing under Nova Scotia statutes.

Accordingly, the basic time limitation period for prosecution of environmental offences is six months "after the time when the subject-matter of the proceedings arose" as established by Section 786(2) of the *Criminal Code*.

F. Proof of Appointment of Inspectors/Investigators

By a memorandum dated July 5, 1991, the Minister of the Environment appointed persons holding specified job descriptions as "inspectors" under the various acts and regulations. See **Tab 8**. Certificates are issues to inspectors and special identification cards are issued to the special constables who enforce the legislation.

For a discussions of the powers of inspectors and investigators see Chapter IV.

G. Proof of Analysis of Samples

Inspectors appointed under the *EPA* may, depending on the nature of the alleged pollution incident, take water or other samples, which

samples may eventually may be subject to analysis by departmental analysts.

The *EPA* allows certain certificates to stand as *prima facie* evidence of the analysis done on the samples taken:

> s.44 In a prosecution, proceeding or hearing under this Act or the regulations, the production of a certificate or report of an analyst of the Department as to the analysis, description, ingredients, quality, quantity or temperature of any material, whether solid, liquid or gas, or any combination of them, is *prima facie* evidence of the facts stated therein and of the authority of the person making the certificate or report without any proof of appointment or signature.

The existence, relevance and continuity of possession of the samples themselves must be proven in the normal manner. If the samples, and the results on analysis thereof, are admitted into evidence, expert evidence will normally be required in order to establish the significance of the analysis results, or lack thereof, in the context of the offence being proven.

H. Other Statutory Provisions as to Documents

Proof of various documentation required in connection with prosecutions under the *EPA* is facilitated by s. 45 of the Act which provides:

> s.45 A consent, notice, license, permit, approval, order or certificate purporting to be signed by the Minister or by an officer of the Department designated in the regulations or a certified copy, is receivable in evidence in an action, prosecution or other proceeding as *prima facie* proof of the facts set out therein without proof of the signature of the official position of the person appearing to have signed it.

Provision is made throughout the *EPA* for issuance and service of enforcement orders and various other documentation. Requirements in respect of document service are as follows:

> s.49(1) Unless otherwise provided in this Act, a notice, decision, order or other document required to be given or served under this Act or the regulations is sufficiently given or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last known address or at his ordinary place of business or residence.

(2) Where service is made by registered mail, the service shall be deemed to have been made on the fifth day after the date of mailing unless the person on whom service is being made establishes that, acting in good faith, he did not through accident, illness or other reasonable cause receive the notice or order until a later date.

I. Admissibility of Waste Monitoring Results

Among the enforcement and monitoring options open to the Minister is that provided under s. 25 of the *EPA*:

> s.25 The Minister may require a person discharging waste into the environment to measure or monitor the discharge in such a manner as the Minister may prescribe and to report the results to the Minister.

In the absence of positive action by the Minister, there is no general duty imposed under the *EPA* to report incidents of pollution to the authorities such as now exists under federal legislation and legislation in other Provinces. There is a particular duty placed upon the owner or operator of a vehicle or storage tank to notify the Minister immediately after a petroleum leak or spill has occurred. (*Petroleum Storage Regulations*, O.I.C. 88-163, N.S. Reg. 33/88). The duty to report spills is also found in other regulations enacted under the *Dangerous Goods and Hazardous-wastes Management Act*.

J. Duty to Report

Two issues arise with respect to compulsory notification:

1. In the event a party required to undertake waste monitoring pursuant to s. 25 discovers the occurrence of a discharge of pollution as would amount to a contravention of the Act or regulations, is it obliged to nevertheless report the matter to the Minister?

2. Can the notice given be used as evidence against the party who has given notice?

Similar issues, in the context of the Ontario statutory duty to give notice to the Ministry of the Environment of the discharge of contaminant under the *Environmental Protection Act* and *Water Resources Act* were considered by the Ontario Supreme Court in *R.* v.

Weil's Food Processing Limited (1992), 6 C.E.L.R. (N.S.) 249 (Ont.Div. Ct.). The Court concluded that the statutory requirement to give notice to the Minister of what amounted to the commission of an offence was contrary to the right to remain silent enshrined in s.7 of the *Charter*. It was concluded that the infringement was saved by s.1 of the *Charter*. It was, however, held that the provision of notice could not be used as evidence against the notifying party. See also *R. v. Bata Industries Limited, supra*.

K. Prosecutions under Nova Scotia Environmental Statutes

The following is a brief summary of some of the leading cases in prosecutions under provincial environmental statutes in Nova Scotia.

1. *Water Act*

(a) *R. v. Joi-Terra Farms Limited* (1987), 79 N.S.R. (2d) 203 (Co.Ct.). Appeal from conviction on a charge of water pollution contrary to s. 16 of the *Water Act*. Appeal dismissed. Held that there was insufficient evidence adduced to establish defence of due diligence. Held that it was not incumbent upon the Crown to establish that the water was not impaired before the alleged incident and that the pollutant in fact impaired the water quality, rather it must only be established that the pollutant had the ability to do so. Fine of $500 imposed.

(b) *R. v. Aberdeen Paving Ltd.* (1981), 45 N.S.R. (2d) 344 (N.S.C.A.). Appeal by way of stated case from acquittal on a charge of causing or permitting water pollution contrary to s.16 (now s.15) of the *Water Act*. Appeal dismissed. Water employed for washing gravel in connection with stone crushing plant escaped from a pond through a leak in the containment berm polluting a nearby stream. Held, confirming the offence was one of strict liability, that although employees of the accused were negligent, the accused had exercised due diligence.

(c) *R. v. Scott Maritimes Limited*, N.S. Prov. Ct. 1988 (unreported). Charge of unlawful discharge of contaminant contrary to s. 15 of the *Water Act*. Fine of $10,000 imposed.

(d) *R. v. Oxford Frozen Foods Limited*, N.S. Prov. Ct., Cole, J. (unreported). Accused was charged with unlawful discharge of polluted contrary to s. 15 of the *Water Act*. In the course of upgrading of processing plant refrigeration system, ammonia

heavily diluted in water was discharged into outfall and eventually into nearby river. A guilty plea entered by the accused and fine of $4,000 imposed. See also *R. v. Oxford Frozen Foods Limited* (1989), 91 N.S.R. (2d) 334 (Co. Ct.) where the same company was fined $4,000 under the federal *Fisheries Act*.

(e) *R. v. West Pubnico Golf and Country Club Limited*, 1991 (unreported). Charge of altering water course without approval of the Minister contrary to S.17 of the *Water Act*. A fine of $1,000 imposed together with a requirement of remedial work in the amount $41,000 to be undertaken.

(f) *R. v. Atlantic Golf Construction Limited*, 1991 (unreported). Charge of altering watercourse without approval contrary to s. 17 of the *Water Act*. Fine of $1,000 imposed.

See also *R. v. Satellite Construction Limited* in next section.

2. *Environmental Protection Act*

(a) *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.). Prosecution of accused on two counts of failing to comply with a Ministerial Order contrary to s. 26(1)(a) of the *EPA*. The accused had been storing certain waste and eventually the Minister issued a Ministerial Order concerning that storage including provision for installation of a fence enclosure and removal of waste material within thirty days. The accused was convicted to failing to comply with the condition requiring construction of the fence. The accused was acquitted on the count relating to removal of waste within the thirty day period on the basis that the job could not have been done within the allotted time and on the basis that the accused's authorization to transport dangerous goods had been revoked for a portion of the permitted day period. Fine of $2,000 imposed.

(b) *R. v. Irving Oil Company Limited* (1981), 45 N.S.R. (2d) 438 (Co.Ct.). Prosecution for discharging waste into the environment without a permit contrary to s. 23(1) of the *EPA* held:

> (a) There is no onus on the Crown to prove that the accused did not have a permit, the onus being upon the accused to prove the existence of the permit.

(b) Oily water mixture accidently released from storage tank did not constitute "waste" as defined in the Act.

(c) Offence was one of strict liability and the accused had established that it had exercised reasonable care.

(c) *R. v. Seafreez Foods Inc.*, Nova Scotia Provincial Court January 29, 1992 (unreported). Charge of discharging waste into the environment without a permit contrary to s. 23(1) of the *EPA*. A significant leak of ozone-depleting freon refrigerant occurred during the course of upgrading of refrigeration system at first processing plant. At the time of release the accused was operating under a Ministerial Order not to release the chemicals and to continuously monitor. A guilty plea was entered and a fine of $15,000 imposed.

(d) *R. v. Satellite Construction Limited*, Nova Scotia Provincial Court, April 2, 1992 (unreported). Charges of discharging waste into the environment without a permit contrary to s. 23(1) of the *Environmental Protection Act* and causing or permitting water pollution contrary to s.15 of the *Water Act*. Accused contractor carried out flushing of newly installed water lines with chlorine at large mining facility resulting in a substantial fish kill. Sentence to be imposed May 22, 1992.

3. Miscellaneous

(a) *R. v. Autoport Limited*. Nova Scotia Provincial Court, January 1992 (unreported). Guilty plea entered by the accused in relation to charges for unsafe transportation of corrosive materials contrary to the *Dangerous Goods Transportation Act*, R.S.N.S. 1989, c.118. Fine of $1,500 imposed.

(b) *R. v. Mechanical Engineering Limited*, Nova Scotia Provincial Court, May 7, 1991, Oxner J (unreported). Accused charged for transporting asbestos waste improperly packaged contrary to s.9 of the *Asbestos Waste Regulations*. Fine of $2,000 imposed.

(c) *R. v. Gordon's Greenhouses Limited*. Unreported N.S. Prov. Ct. 1991. Accused charged with failing to report a petroleum product spill contrary to s.10(1)(a) of the *Petroleum Storage Regulations*. A valve was left open on an oil burner unit and approximately 5400 gallons of Bunker C. oil spilled. A Ministerial Order was issued to clean up the spill. Remedial costs aggregating $60,000 to $70,000 were incurred. A fine of $4,500 imposed. Certain

undertakings were made by the accused with respect to remedial action.

(d) Note that the above listing is not exhaustive and that there are various decisions of Nova Scotia Courts in relation to charges under federal environmental statutes. See for example:

R. v. Oxford Frozen Foods Limited (1989), 91 N.S.R. (2d) 334 (Co.Ct.). (Fisheries Act).

R. v. Enheat Incorporated, (1985) 4 F.P.R. 205 (N.S. Prov.Ct.). (Fisheries Act).

R. v. Surette Battery Company N.S. Prov. Ct., 1988 (unreported) (Fisheries Act).

R. v. Midland Transport Limited N.S. Prov. Ct., February 28, 1992 (unreported) (*Transportation of Dangerous Goods Act* R.S.C. 1985, c.T-19). Due diligence exercised.

R. v. Crossley Karastan Carpet Mills Limited (1982), 3 F.P.R. 253 (N.S. Prov. Ct.). Crown not able to prove exactly where oil coming from within company premises. Charge of depositing deleterious substance dismissed.

L. Index of Prosecutions

See **Tab 11** for a summary of cases from 1981 to April 1, 1992.

VI. LIABILITY IN ENVIRONMENTAL OFFENCES

A. Corporate Liability

Section 3(m) of the Nova Scotia *Environmental Protection Act*, R.S.N.S. 1989, c.150 (EPA) defines "person" to include a partnership or corporation. In most cases of environmental prosecutions, the defendant will be a corporation or a partnership operating a business which is somehow responsible for environmental degradation.

1. Liability of the Corporation Itself

The liability of a corporation for environmental pollution is governed by the following statement in *R. v. Sault St. Marie (City)*, [1978] 2 S.C.R. 1299:

> The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused's act and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence by taking reasonable steps to ensure effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. (emphasis added).

These principles are reflected in s.46 of the *EPA*, which reads:

> s.46 - In a prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all reasonable diligence to prevent its commission.
>
> Provisions similar to this are necessary to assist in proof of the offence because of the difficulties in determining who is the directing mind and will of the

corporation and establishing relative responsibilities and roles of various actors within the corporation: Swaigen, "*Ontario's Environment Enforcement Statute Law Amendment Act*" (1986), 2 C.E.L.R. (N.S.) 14 at 18.

2. Piercing the Corporate Veil

The seminal case of *Salomon v. Salomon & Co.*, [1897] A.C. 22, 66 L.J.CH. 35(H.L.), affirmed the separate personality of corporation and the limited liability of shareholders.

The Courts have refused to recognize corporations as separate legal entities where to do so would be flagrantly opposed to justice. See *Clarkson Co. Ltd. v. Zhelka* (1967), 64 D.L.R. (2d) 457, [1967] 2 O.R. 565 (H.C.). Examples of such cases are where parent/subsidiary relations can be attacked as artificial, and where owners/managers are guilty of fraud, or where incorporations can be characterized as sham transactions.

The corporate veil may be pierced where large corporations are trying to avoid large fines and liability by establishing a network of small corporations: *United Keno Hill Mines Limited* (1980), 10 C.E.L.R. 43 (Yuk.Terr.Ct.); *R. v. Canadian Marine Drilling Ltd.* (1983), 13 C.E.L.R. 8 (Yuk.Terr.Ct.).

The following factors may be relevant to a determination of parental liability for a subsidiary [See *Worldwide Carriers Ltd. v. Steamships Co.*, 301 F.Sup. 64 (U.S.D.C.,N.Y.) (1968)]:

- whether the parent corporation owns all or most of the capital stock of the subsidiary

- whether the parent and subsidiary corporations have common directors or officers

- whether the parent corporation finances the subsidiary

- whether the parent corporation has subscribed to all the capital stock of the subsidiary or otherwise caused its incorporation

- whether the subsidiary has grossly inadequate capital

- whether the parent corporation pays the salaries and other expenses or losses of the subsidiary

- whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation

- whether in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation or its business or financial responsibilities referred to as the parent corporation's own

- whether the parent corporation uses the property of the subsidiary as its own

- whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest

- whether the formal legal requirements of the subsidiary are not observed

Courts do not have to lift the corporate veil in order to impose individual liability on business owners (see Officers' and Directors' Liability). In the case of one-person corporations, it is not double jeopardy to charge (and convict) both the corporation and the business owner. See *Shamrock Chemicals Ltd.* v. *R.* (1989), 4 C.E.L.R. (N.S.) 315 (Ont.Dist.Ct.).

B. Officers' and Directors' Liability

The law in Canada does not render directors *ipso facto* responsible for the offences of the corporations they serve. Apart from liability arising simply by virtue of being a director, an officer or a director may be guilty of an environmental offence or subject to personal liability in several other ways. First, as a director or officer one may commit an offence directly, either personally, or by causing or permitting it to be committed by others under one's supervision, or by failing to take reasonable steps to prevent a foreseeable occurrence that is within one's influence or control. Liability does not depend upon whether the officer or director personally foresaw the exact occurrence, but upon whether the general type of problem was foreseeable: *R.* v. *Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (C.A.).

Second, one may be liable as a party to an offence committed by the corporation if one did anything to assist the corporation to commit the offence or counselled its commission. This requires proof of

intent, that is, knowledge of the relevant facts, although it is not necessary that one knew that the facts disclosed an offence: *R.* v. *Fell* (1981), 34 O.R. (2d) 655 (C.A.).

Third, an officer or director may be prosecuted for failure to control the corporation to ensure that it complies with a Ministerial or Judicial Order. If the order is an administrative order, the prosecution will be conducted in the usual way. If, however, the order is a Court order, the director or officer may be cited for contempt of Court and may go to jail, as in *Metropolitan Toronto v. Siapas* (1988), 3 C.E.L.R. (N.S.) 151 (Ont.H.C.), where an officer of a metal plating company was sentenced to jail on a contempt conviction for failing to obey a Court prohibition order based on repeated violations of a municipal sewer-use by-law.

1. Individual Liability by Virtue of Position:

There is no specific provision in the *EPA* which expressly charges directors or officers with liability for environmental offences. The offence created by s. 23 targets persons who "own, occupy, operate or [are] responsible for" the operation of an undertaking that pollutes. Arguably, directors and officers of corporations can be construed as persons responsible for the operation of a polluting facility, although Canadian case law thus far indicates that merely nominal directors are not responsible unless they exercise *de facto* control.

In *R.* v. *Blackbird Holdings Ltd.*, unreported, June 22, 1990 (Ont. Prov. Off. Ct.), an appeal from the Ontario Environmental Appeal Board, the wife and son of the corporation's president as nominal directors were found not to be "persons responsible". The Court found the directors did not have *de facto* control over the source of the contaminant. The Court indicated that it was prepared to "lift the corporate veil to impose a control order on directors who were responsible for the operation". The director's position of influence and control to prevent the commission of the offence will be examined: *R.* v. *Sault St. Marie, supra*. *Mens rea* is not required -- what counts is the director's position to exercise continued control of the activity and to prevent pollution.

In *R.* v. *Harkin,* unreported July 11, 1989 (Ont.Prov.Ct.), both Shell Oil and a Shell supervisor were found to be persons with "control" over a spilled pollutant.

While it is not necessarily true that merely nominal officers and directors will be persons responsible (*R.* v. *Blackbird Holdings Ltd., supra*), it is increasingly difficult to dispute that directors are *ipso facto* responsible for the operation and conduct of the corporation which they serve. In the United States, nominal

directors have been convicted of environmental offences for failing to use their position to prevent pollution: see State of *Hawaii v. Kailua Auto Wreckers Inc., infra*. Canadian Courts are imposing an ever-increasing standard of care on directors.

2. Direct, criminal or tortious liability:

Directors' and officers' liability can arise where a director or officer personally commits a prohibited act. One of the earliest cases of criminal liability being imposed on a director of a corporation is *R. v. Medley* (1834), 172 E.R. 1246 (K.B). This was a nuisance prosecution against two directors of a corporation resulting from a discharge of effluent into the Thames River. The directors testified that they had no knowledge of the nuisance but were convicted nevertheless as they had the means to control the nuisance and had taken no measures to prevent the problem.

The critical question in prosecutions of officers and directors will be the identification of the responsible individuals in any particular case. Influence and control have long been the hallmarks of liability for so-called public welfare offences, and were re-emphasized by the Supreme Court of Canada in *R. v. Sault Ste. Marie, supra*, at 161 D.L.R.:

> It is not necessary that the person had *mens rea*, that is, intended to cause harm, in order to be held responsible for the consequence of his actions or failure to act. Even in a prosecution context, "liability rests upon control and the opportunity to prevent, i.e. that the accused could have and should have prevented the pollution."
>
> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control" . . . The purpose, Dean Roscoe Pound has said in "Spirit of the Common Law" (1906) is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of the public or safety or morale". As Devlin J. noted, a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. Devlin, J. added, however, "if a man is punished because of an act done by another, whom he

> cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

Since it is not always easy to identify the responsible individuals in a corporate context, and there may be numerous potentially responsible persons, the authorities may well adopt an approach aimed at holding each such person responsible. For example, in *R. v. Placer Developments* (1983), 13 C.E.L.R. 42 (Yuk.Terr.Ct.), where a number of persons contributed to the "dance of disaster", each one was held liable.

The concept of influence and control over the affairs of a corporation are also factors in determining the tortious liability of directors and officers. Directors and officers can be sued personally for their acts or omissions committed while serving the corporation. Claims against an officer or a director of a corporation would most likely be based in nuisance or in negligence law. Other possible causes of action against directors and officers personally include trespass, *Rylands v. Fletcher* and conspiracy.

3. Parties to An Offence: Aiding and Abetting

Criminal liability of a director or officer may be difficult to establish as arguments can be made that the *actus reus* or the *mens rea* of the director or officer are actually the *actus reus* or *mens rea* of the corporation and not of the individual. In these cases, the Crown may allege that the officer or director is a party to the offence under s. 21 of the *Criminal Code*.

Section 21 of the *Criminal Code* states:

> s.21(1) - every one is a party to an offence who
> (a) actually commits;
> (b) does or omits to do anything for the purpose of aiding any person to commit; or
> (c) abets any person in committing it.
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party that offence.

Section 21 was considered in *R. v. Fell* (1981), 34 O.R. (2d) 665 (Ont.C.A.). Fell, a corporate director, was jointly charged with two corporate accused on six counts of making false and misleading representations under the *Combines Investigation Act* (Canada). The Ontario Court of Appeal held that the fact that Fell's acts were those of the corporation for the purpose of imposing corporate liability did not prevent the conviction of Fell personally if he actually committed the offence or was an aider and abettor under s. 21. With respect to s. 21, the Court suggested that liability as an aider and abettor required the existence of *mens rea* which meant knowledge of the circumstances which constitute the offence.

It can be argued that this case is distinguishable and should not apply to provincial public welfare offences, such as the environmental offences discussed above, because the *Combines Investigation Act* is essentially criminal law, rather than civil or regulatory law. However, it is noteworthy that s. 21 of the *Criminal Code* is made applicable to provincial statutory offences, including those created by the *EPA*, by s.7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450.

4. Scope of Directors' and Officers' Duty of Care

Aside from the general principles of due diligence discussed in Chapter VII, there is as yet no definitive statement on the content of the positive duty of reasonable care expected of officers and directors. *R. v. Bata Industries Ltd.*, unreported February 7, 1992, Ormston Prov. Div. J. (Ont.), provides the most helpful Canadian commentary yet. In the United States a whole body of case law has developed concerning the duties and responsibilities of directors and officers under public welfare statutes.

The leading United States case is *United States v. Park* 421 U.S. 658 (1975) (U.S.S.C.). In this case, the U.S. Supreme Court found that the prosecution has made a *prima facie* case against the defendant chief executive officer when it proved that by reason of his position in the corporation he had responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of and failed to do so. The defendant argued that he had properly delegated this responsibility. The Court discounted the significance of the delegation and instead concentrated on the authority of the Defendant's position. Once on notice of an earlier violation, the defendant was also on notice that he could not rely on his system of delegation to prevent or correct future violations. He was therefore properly convicted.

The reasoning in *Park* is very much like the Supreme Court of Canada's reasoning on the responsibility of the City in *R. v. Sault*

St. Marie, supra. A director must use his or her authority to prevent corporate offences.

American state Courts have gone so far as to hold corporate officers liable for serious pollution where they hold office merely as an accommodation. In *State of Hawaii v. Kailua Auto Wreckers Inc.*, 615 P2d 730 (1980), the wife of the vice-president, director and principal manager of the corporation was convicted of violating an air pollution regulation. The corporation continued to engage in air pollution after being denied an extension of time for compliance. While the wife was not actively participate in business operations, the Court found her liable on the basis that the infraction was continuous, flagrant and constituted a serious problem in the community. The defendant with the slightest effort to carry out her corporate duties could have become informed of the corporation's affairs and aware of its illegal activities.

The most recent Canadian example of directors of a corporation being prosecuted for environmental offences is the case against Thomas Bata and two other directors of Bata Industries Limited: *R. v. Bata Industries Limited, supra.* The case involved barrels of solvents which were stored behind Bata's plant in Batawa, Ontario. Some barrels leaked, causing ground water contamination in the area. Charges were laid against the directors because of their failure to prevent the contamination. The defence of due diligence failed for two of the directors because of their failure to institute the required corporate environmental polices and internal structures to keep themselves informed of potential environmental problems.

The Court found that the due diligence standard of case imposed upon the directors for personal liability for environmental offences was not too vague and therefore contrary to s. 7 of the *Charter* and fundamental principles of justice.

Whether under statute or under common law, directors must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Although many of their powers may be delegated to officers and managers, they must exercise due care in selecting competent officers and managers.

The Court held that the due diligence standard had two components:

> (1) whether the directors could have reasonably foreseen the likelihood of discharge; and
>
> (2) whether they met the reasonable precautions standards of their industry.

What is reasonable and foreseeable at a particular time and place must be measured in light of the particular industry or activity. That determination is made on the basis of the evidence at the trial as a matter of fact.

In the absence of Canadian authorities, Ormston, Prov. Div. J. quoted from *Michigan Natural Resources Commission v. Arco Industries*, W.C. 750 (W.D. Michigan 1989) as follows:

> This Court will look to evidence of an individual's authority to control, among other things, waste handling practices - evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position: distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful waste disposal . . .
>
> Both parts of this test boil down to corporate and societal responsibility - responsibility implicitly undertaken by the acquisition of increased power or authority within the corporation and responsibility explicitly undertaken by job description or agreement. Such a liability standard will encourage increased responsibility as an individual's stake in the corporation increases . . .

The Court in *Bata* formulated a "minimum profile" against which directors' liability should be measured. The Court stated:

> In my opinion, this is the minimum profile that existed at the time of these offences. It may well be that developing industrial standards and legal precedent will enhance and more clearly delineate directors' responsibility.
>
> I asked myself the following questions in assessing the defence of due diligence:
>
> (a) Did the Board of Directors establish a pollution prevention "system" as indicated in R. v. Sault St. Marie, supra, i.e. was there supervision or inspection? Was there improvement in business methods? Did he exhort those he controlled or influenced?

(b) Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the Board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the Board in a timely manner?

In answering these questions, the Court considered the following factors:

(a) the directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties;

(b) the directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders;

(c) the directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks;

(d) the directors should immediately and personally react when they have notice this system has failed.

The Court concluded that within this general profile and dependent upon the nature and structure of the corporate activity, one would hope to find remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a pro-active environmental policy.

Thomas Bata, the chief executive officer of the Bata organization, and the director with the least personal contact with the plant was acquitted. His responsibilities were directed at the global level of the Bata shoe organization, and he attended on site only once or twice a year to review the operation and performance of the facility. Under his direction the company implemented an organization-wide environmental policy. Since he had placed an experienced director on site, the Court found he was entitled in the circumstances to assume that his delegate was addressing the environmental concerns and to assume that his on site

manager/director would bring to his attention any problem. He was also entitled to rely upon his system as evidenced by a written environmental policy unless he became aware the system was defective. He was unaware of any environmental problems.

The Court stressed that it is very difficult in the ordinary course for a director to establish due diligence if there are no contemporary written records.

The second director presented another variation in directors' liability. His responsibility was more direct than Mr. Bata, but less than the third director charged. The Court noted that the "doctrine of responsible share" is well accepted in American jurisprudence (*U.S. v. Park, supra*), and was applicable in this case. The second director was a president of the company and was on site approximately once a month. For at least six months of the time alleged in the charges, he had personal knowledge of the waste storage problem. He did not view the site to assess the problem. No temporary steps were taken for containment until such time as removal of the waste could be effected.

The Court found that in the circumstances, due diligence required him to exercise a degree of supervision and control that "demonstrates that he was exhorting those whom he may be normally expected to influence or control to an accepted standard of behaviour": *R. v. Sault Ste. Marie, supra*. The director had a responsibility not only to give instruction but also to see to it that those instructions were carried out without delay in order to minimize the damage.

The third director charged was the on site director and manager, and thus the Court found him most vulnerable to prosecution. The Court noted that the director had demanded the authority to control his work environment before he took the job, that he had experience in the production side and was aware toxic chemicals were used in the manufacturing process. He had been reminded of his environmental responsibilities through the company's environmental compliance policy.

This director had commissioned an appraisal of the cost of removing the waste from the site when it was first brought to his attention. The Court found that "red flags" should have been raised in his environmental consciousness when the first quote of $58,000 was obtained. Instead of simply dismissing it out of hand, he should have inquired why it was so high and investigated the problem. The director had no qualms about accepting a second quote of $28,000, but he had no further information other than it was cheaper. The Court found that this was not an informed business judgment, and that in any event, he could not rely upon the business judgment

rule, which at its core recognizes that a business corporation is profit oriented and that an honest error of judgment should not impose liability provided the requisite standard of care is met.

The Court found that in addition he could not shelter behind advice he received from his delegate. As the "onsite director", the defendant had a responsibility in this type of industry to personally inspect on a regular basis. He also had an obligation if he decided to delegate responsibility to ensure that the delegate received the training necessary for the job and to receive detailed reports from the delegate. A conviction was entered against him.

C. Employer's Liability

Corporations (employers) have direct primary liability for the acts or omissions of all their servants or agents, unless the act was done (a) without its knowledge or consent or (b) it exercised all reasonable diligence to prevent the offence. (s. 46 *EPA*)

The direct liability of employers for the acts or omissions of servants and agents was also established in *R. v. Canadian Dredge & Dock Co. Ltd.*, [1985] 1 S.C.R. 662. This direct liability must be distinguished from secondary or vicarious liability, which is not an accepted basis of penal liability in Canada. The corporation is liable for its own failure in failing to prevent the offence; a corporation always has influence and control over the acts and omissions of its agents and servants.

Where the question is not the *actus reus* of the offence but the defence of due diligence, the due diligence which matters is that of the corporation's directing minds: *R. v. Sault St. Marie, supra.*

The liability of corporations for public welfare offences is not the same as their liability for *mens rea* offences. Where *mens rea* is an element of the offence, a corporation is only liable for the *mens rea* of its directing minds. The directing minds of the corporation are those persons who represent the "*de facto* directing mind, will, centre, brain or alter ego" of the corporation. Normally, a director or senior executive officer will be one of the directing minds of the corporation.

Where a corporation and one or more of its employees are charged with the same offence, the *actus reus* is normally committed by both or by neither. However, they may differ as to due diligence. Accordingly, one may be convicted although the other is acquitted.

In *Canadian Dredge & Dock Co. Ltd., supra,* presidents, vice-presidents and general managers were all held to be directing minds. In *R. v. J.J. Beamish Construction Co. Ltd.* (1967), 59 D.L.R. (2d) 6 (Ont.C.A.), a director and superintendent were held to be directing minds. In *R. v. P.G. Marketplace and MacIntosh* (1979), 51 C.C.C. (2d) 185 (B.C.C.A.) an officer, supervisor and auditor were deemed to be the directing minds. A drilling foreman was a directing mind in *R. v. Panarctic Oils Ltd.* (1983), 44 A.R. 385 (N.W.T.Terr.Ct.). Lower level employees without a measure of direction and control of the corporation are not directing minds, thus an ordinary salesman was not a directing mind in *R. v. Kimco Steel Sales Ltd.* (1988), 43 C.C.C. (3d) 104 (Ont.Dist.Ct.).

In *R. v. St. Mary's Cement Ltd.* (1981), 11 C.D.L.R. 15 (Ont.Prov.Off.Ct.), the corporation was found to have exercised due diligence, but a mechanic who had chosen to run a risk was convicted. Conversely, in *R. v. Vespra (Township)* (1990), 9 W.C.B. (2d) 166 (Ont.Prov.Ct.), the employee had exercised due diligence, but the corporation was convicted.

D. Lender's/Receiver's/Trustee's Liability

In *Panamericana de Bienes Y Servicos S A v. Northern Badger Oil and Gas Limited,* [1991] 5 W.W.R. (Alta.C.A.) ("Northern Badger"), the Court held that a Court appointed receiver/manager of a bankrupt oil company must comply with an abandonment order of the Alberta Energy Resources Conservation Board (AERCB). The order required the receiver/manager to carry out abandonment work which involved the sealing of seven oil wells at the end of their useful life in order to render them environmentally safe.

As a result of this case, receivers and trustees who assume management responsibilities may be exposed to all kinds of environmental liabilities, as persons in occupation or in control of an environmental hazard. Compliance with environmental legislation may override security interests even in a bankruptcy situation.

In *Northern Badger,* the Court held that proceeds from the disposition of assets held by a receiver/manager must first be applied to pay for abandonment costs before being distributed to secured creditors, notwithstanding that the company was in bankruptcy and that the scheme of distribution under the *Bankruptcy Act* places a secured creditor ahead of all other claimants. The fact that the receiver/manager had operated the wells and reaped the benefits of the oil and gas extraction licences may have been an important factor in the imposition of liability in this case.

In *Re: Lamford Forest Products Ltd.*, unreported December 17, 1991 (B.C.S.C.), [1991] B.C.J. No. 3681, Harvey, J. found that a trustee in bankruptcy could not be held personally liable for the expense of remediation beyond the funds realizable from the estate of the bankrupt. The Court stated:

> In the same way that a trustee does not become personally responsible for any other debts of the bankrupt, the trustee cannot be held personally liable for the costs of clean-up beyond the funds realizable from the estate.

The Court considered that since a trustee in bankruptcy steps into the shoes of the bankrupt company, it is incumbent on him to comply with the order to the extent that the assets of the estate will permit. The Court stated:

> The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors . . . but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee's fees to be deducted from the amount paid out under the order and will have no personal liability for the costs of cleanup of the contaminated site as discussed, supra. In keeping with the findings I have made when answering the questions, I direct that in the event that there are insufficient funds to meet the requirements, the payment of funds pursuant to the order must be subject to a reduction equal to the amount of the trustee's fees.

It is noteworthy that in *Re Lamford* the trustee did not operate the bankrupt's business and all environmental damage occurred before the assignment in bankruptcy.

It should be noted that s.54 of the *EPA* allows the Province to remedy pollution and recover remediation expenses by action. According to the *Northern Badger* and *Lamford* decisions, once the Crown proceeds under these sections and in the event of the offender's bankruptcy, the Crown becomes a "creditor" whose rights to recovery will be determined in accordance with the scheme under the *Bankruptcy Act*.

E. Responsible Parties

Environmental degradation often only comes to light after many years of incremental damage and in many cases there may be several parties responsible for the problem, or the party responsible may no longer be the owner or occupier of the source of contamination or contaminated land. Several jurisdictions, notably Ontario, have attempted to make former owners, occupiers or "original polluters" of contaminated sites subject to administrative orders by specifically including them as "persons responsible".

The question has been asked whether such legislative attempts to make "polluters pay" can validly operate as retrospective legislation. While the *EPA* does not specifically target former owners or occupiers or responsible parties, the Province is party to a federal-provincial agreement requiring the enactment of effective polluter pay legislation which would operate retrospectively.

1. Retroactive/Retrospective Liability for Environmental Damage

The issue of retrospectively is only relevant from the perspective of administrative orders. With respect to prosecutions for offences under the provincial environmental legislation, s.786(2) of the *Criminal Code* (which is deemed to apply by virtue of s.7 of the Nova Scotia *Summary Proceedings Act*), stipulates that no charges may be brought later than six months after the time when the subject matter of the proceeding arose. While in certain cases it may be difficult to determine when the subject matter of an environmental proceeding arose, arguably the defendant would at least have to have been aware of the circumstances giving rise to the charge, or to have been not wilfully blind to such circumstances. The *Canadian Environmental Protection Act* creates some indictable offences which have no limitation period, but no attempt has been made by Parliament to make these offences retrospective. That is, there is no suggestion in any of those provisions that a person could be prosecuted for pollution which occurred prior to the enactment of the particular offence.

A retroactive statute is one which has effect as of a time prior to its enactment. The statute operates backward and changes the law as of some date prior to its proclamation. A retrospective statute also attaches new consequences to an event that occurred prior to its enactment. It is distinguished from a retroactive statute because a retrospective statute takes effect only from and after its enactment. In other words, it gives an action done prior to its enactment a different legal effect, but that difference applies only after enactment of the statute. Retrospective statutes

operate only in the future, after enactment, but do so by changing the legal effect of an event which occurred in the past: Dreidger, *Construction of Statutes*, 2nd ed., 1983, at pp.185-203. Most current environmental statutes claim retrospective, not retroactive, effect. The *EPA* speaks in the present tense and s.26, which authorizes Ministerial Orders, is directed to a person who "owns, occupies, operates, or is responsible for the operation of a plant, etc." This language would seem to preclude orders against former owners and occupiers.

Nova Scotia is required pursuant to a provincial/federal agreement to introduce retrospective "polluter-pay" legislation. Retrospective legislation must pass a stringent test for validity.

A three-part analysis should be employed to answer the question of whether an original or former polluter can be subject to retrospective ministerial orders:

1. Is the statute subject to the presumption against retrospectively or retroactivity?

2. If the statute is subject to the presumption, has the effect of the presumption been overcome by clear legislative language? (See Dreidger, p. 185-203)

3. If the statute is not subject to the presumption or if the effect of the presumption has been overcome by clear legislative language, can the statute be attacked as being contrary to the *Charter*?

The traditional rule against retrospectively is simply a statutory presumption. In light of the *Charter*, the Courts may elevate the presumption against retrospectively to a constitutional principle capable of overriding legislative intent. The relationship between retrospectively, retroactivity, moral innocence and s.7 of the *Charter* was considered in the case of *R. v. Finta* (1989), 50 C.C.C. (3d) 236, (Ontario High Ct.).

From the point of view of potential defendants, the principal problem with s.7 of the *Charter* is that it does not protect corporations: *Irwin Toy Limited v. Quebec Attorney General* (1989), 58 D.L.R. (4th) 577 (S.C.C.). It is true that corporations can rely on s.7 in defences to prosecutions, since a corporation cannot be convicted under a law which itself violates the *Charter*: *R. v. Wholesale Travel Group Inc.* (1989), 90 O.R. (2d) 545, (C.A.), affd. on this point S.C.C. October 24, 1991; *R. v. Big M Drugmart Limited* (1985), 18 C.C.C. (3d) 385 (S.C.C.). However, corporations cannot rely on s.7 in civil or administrative actions. Corporate

defendants may, however, resort to other sections of the *Charter* upon which to base the same arguments.

Section 8, which protects everyone's right to be secure from unreasonable search and seizure, has already been successfully used by a corporate defendant in an environmental case on the basis that a ministerial order amounted to an unreasonable seizure: *R. v. Island Farm and Fishmeal Limited*, unreported May 1, 1991 (P.E.I., S.C.).

Section 8 does apply to corporations: *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.). As the Supreme Court said, the purpose of s.8 is to limit whatever powers of search and seizure the federal or provincial governments already possess. It does not itself confer any power of even reasonable search and seizure.

Section 8 guarantees a "broad and general right to be secure from unreasonable seizure." Can an order requiring a company to pay large cleanup costs be characterized as a "seizure"? Some cases have held that administrative orders which sterilize the use of private property can constitute a "seizure", even where the government itself receives nothing. For example, in *R. v. Halpert* (1984), 48 O.R. (2d) 249 (Co. Ct.), the Court held that there was a "seizure" when a weights and measures inspector sealed a measuring device which failed to comply with the regulations, thus preventing its use.

Legislatures may authorize retrospective orders for the cleanup of pollution, even if such pollution occurred prior to the adoption of the authorizing statute. To do so, the legislation must be unmistakably clear; any ambiguity will usually be construed against retrospectively. Even where statutory intent is clear, the *Charter* may provide a basis for which to argue orders are constitutionally unacceptable.

2. Case Law: *Northern Wood Preservers Inc.*

Prior to the amendments to the Ontario *Environmental Protection Act* designed to subject former owners and occupiers to administrative orders, it had been held that such persons were not properly included in such an order.

In *Canadian National Railway Co. v. Ontario (Director, Environmental Protection Act*, (1991), 80 D.L.R. (4th) 269 (Ont.Ct.Gen.Div.) (*"Northern Wood Preservers"*), certain property had been contaminated as a result of the activities of a previous tenant over a period of many years.

The Ontario Divisional Court held that an order requiring preparation of studies and a cleanup plan could be properly issued against the current tenant of the contaminated property. The current landlord, the previous landlord and a mortgagee were, upon the facts of the case, and the language of the statute not liable.

Since the *EPA* does not specifically attach liability on former owners and occupiers, and operates in much the same way as the Ontario legislation did prior to amendment, the reasoning in the *Northern Wood Preservers* case may be applicable to Nova Scotia.

3. Proposed Polluter-Pay Legislation

In "*A Discussion Paper on Environmental Law Enforcement in Nova Scotia*" issued by the Nova Scotia Department of the Environment in 1991, it is stated at p.5:

> One of the most important concepts of environmental management is the polluters-pay principle, which requires those responsible for environmental pollution or damage to pay the costs and expenses for damages, environmental clean up and rehabilitation.

While the *EPA* and other statutes related to environmental protection (such as the *Mineral Resources Act*) allow the Province to order polluters to pay clean up costs or reimburse the Province for clean up costs undertaken with respect to contamination caused by the polluter, Nova Scotia has an obligation to introduce retrospective polluter-pay legislation pursuant to a provincial-federal agreement. The basic concept of the proposed legislation is that the polluter pays, whether the polluter is the property owner, the person in control or in charge of a facility, the person in control or in charge of a contaminant, a person in possession of a contaminant (trustees and receivers in a bankruptcy), lenders, or former polluters. It is the intention that the potential responsible party include the person who causes the pollution or those who may have been in some way involved. The objective is that there will be someone to pay for the remediation other than the taxpayer.

Although the legislation has yet to be tabled, the challenge for the drafters will be to create legislation which can withstand the challenges to its validity as discussed above, while at the same time effectively identify responsible parties and provide mechanisms to ensure effective environmental remediation.

F. Minister's and Department's Liability

Section 55(2) of the *EPA* states that the Minister, his servants or agents or anyone authorized by him are not subject to civil liability for anything done by them in accordance with and pursuant to the act and regulations.

In some provinces, ministry staff are not liable unless they acted in bad faith (see for example, *Environmental Protection Act*, R.S.O. 1990, c.E. 19, s. 180) They may, however, be named as defendants in an application for a judicial review. In *Merritt v. New Brunswick* (1990), 108 N.B.R. (2d) 107 (C.A.), the Court held that a staff official was not liable for negligent misrepresentation, where the plaintiff was refused permission to import coal ash. He alleged that the official had led him to believe the permit would be granted but the Court found he failed to prove his case when measured against the four prerequisites to liability for negligent misrepresentation set out in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 525 (C.A.).

In *Swanson Estate v. Canada* (1990), 32 F.T.R. 129), affirmed (1991), 124 N.R. 218 (Fed.C.A.), the Court reviewed the responsibility of the Crown for enacting regulations but not properly enforcing the same. In *Swanson Estate v. Canada* the Federal Court reviewed the responsibility of the Crown for enacting regulations but not properly enforcing the same. The Appeal Division found Transport Canada to be liable in circumstances in which it owed a duty to enforce safety regulations, was negligent in not doing so, and its negligence caused loss to the plaintiffs.

VII. DEFENCES IN ENVIRONMENTAL OFFENCES

A. Classification of Offences

The presumption that *mens rea* is an essential element of all criminal offences, may be rebutted by either of two sets of factors. First, the language of the statute creating the offence can obviate proof of *mens rea*. *R.* v. *Pierce Fisheries*, [1971] S.C.R. 5, 12 D.L.R. (3d) 591. Second, the subject matter of the legislation may rebut the *mens rea* presumption. Three classes of subjects have been identified as exceptions to the basic presumption: *R.* v. *Pierce Fisheries*, *supra*:

1. proceedings for summarily enforcing a civil right which are criminal in form only;

2. public nuisances; and

3. actions not essentially criminal that in the public interest are prohibited under the threat of penalty.

The Supreme Court of Canada in *R.* v. *Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 confirmed that environmental offences are generally characterized as strict liability offences not requiring proof of guilty intent. In that case, the Supreme Court of Canada added a third intermediate category of strict liability offence to classes 2 and 3 above. Thus, there are three categories of offences:

1. *Mens rea* offences: true criminal offences, which require proof by the prosecution of some positive state of mind such as intent, knowledge, or recklessness, either as an inference from the nature of the act committed, or by additional evidence.

2. Absolute liability offences: where conviction follows upon proof of the offence, and where it is not open to the accused to exculpate himself by showing that he was free of fault.

3. Strict liability offences: the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care to avoid the act or omission. Due diligence will be available as a defence where the accused can show:

(a) that he reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or

(b) that he took all reasonable steps to avoid the particular event giving rise to the charge.

In *Sault Ste. Marie*, *supra*, the Supreme Court of Canada concluded that the *Ontario Water Resources Act* was a public welfare statute and that the offence of causing or permitting the discharge of any material in any watercourse which would impair its quality fell into the third category of offence described above. Most environmental offences will fall into this category. Thus, the defendant may escape guilt by proving that he exercised due diligence.

B. Burden of Proof in Regulatory Offences

1. Crown

The Crown need only prove the elements of the offence as set out in the statutory provision ["persuasive burden"]. For example, proof of a violation of s. 23 of the Nova Scotia *EPA*, which prohibits the discharge of waste into the environment without a permit, would require proof by the Crown of:

- ownership, occupation, operation, or responsibility for
- a plant, structure, facility, undertaking or thing
- that discharges, or threatens to discharge
- waste
- into the environment
- or otherwise causes or tender to cause "pollution"
- without a permit.

2. Defence

Once the Crown has proven the elements of the offence charged, the onus of proof ["evidential burden"] shifts to the accused to show that he exercised due diligence. The recent decision of the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*, *supra*, has confirmed that the rule in *Sault St. Marie* requiring the

defendant to prove due diligence on a balance of probabilities does not breach ss. 7 or 11(d) of the *Charter*. If it does breach those sections, it is saved by s.1 of the *Charter*.

C. The Scope of Due Diligence

1. Ordinary Standard of Care

Courts have considered the following factors when establishing the ordinary standard of care in regulatory offences:

- **Breach of statutes/regulations**: Breach of provisions which set minimum standards of acceptable conduct for regulated activities is *prima facie* evidence of negligence and therefore of lack of due diligence.

- **Foreseeability**: One must prepare for risks which are objectively foreseeable. This includes risks which a reasonably thoughtful person could have foreseen might flow from the accused's operations: *R.* v. *Rio Algom Ltd.* (1988), 3 C.E.L.R. (N.S.) 171 (Ont.C.A.).

- **Custom**: The custom of the trade may reflect a minimum standard of care. However, this is only one factor which should be considered, and all of the circumstances should be taken into account. *R.* v. *Hall's Refrigeration Limited* (1987), 4 F.P.R. 247 (Nfld. Prov. Ct.).

2. Factors which Augment the Ordinary Standard of Care

In a case decided under the Game Ordinance of the Yukon Territories, *R.* v. *Gonder* (1981), 62 C.C.C. (2d) 326 (Y.T.Terr.Ct.), Stuart C.J. set down a list of factors to consider in determining if the defence of due diligence had been proven. The factors mentioned at p. 331 include:

(a) The general standard of care common to the business activity in question: established procedures.

Evidence of a standard practice is only one important part of the overall test. The real test is the degree of due diligence required in the circumstances of each case.

In *R.* v. *Aberdeen Paving Limited* (1981), 45 N.S.R. 344 (S.C.A.D.), the Court held that the responsible officers of a corporation must (a) not only establish a proven system and procedure to prevent the harm prohibited but also (b) must have exercised all reasonable

care to see that the procedures were carried out to prevent any offence. In *Wholesale Travel Group, supra*, the Court stated that the question is not whether the accused had exercised some care, but whether the degree of care was sufficient to meet the standard imposed.

In *R. v. Bata Industries Ltd.*, February 7, 1992, Ontario Court of Justice, Provincial Division, Ormston J. Prov. (unreported), the Court stated:

> The Defendant must establish on the balance of probabilities that they were duly diligent, that is they must establish that they exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

In *Bata*, the Court found that while environmental guidelines had been promulgated by the Corporation, the directing minds took no steps towards implementation because of economic considerations. In the absence of evidence of shoe manufacturing industry standards and practices of waste control, the Court also thought it was appropriate to examine the standards and practices in a neighbouring industry.

In *R. v. Toronto Electric Commissioners* (1991), 6 C.E.L.R. (N.S.) 301 (Ont. Gen. Div.), the company did not raise a reasonable doubt as to its due diligence. The company had an elaborate system of inspections and a PCB control system, but the two systems were not well co-ordinated. Employees who knew the transformers were leaking did not know that they contained PCB's and vice versa. The chain of command was too great, the report form used within the utility was inadequate and the response to the reports was lax. Although the company's maintenance program was excellent in theory, it did not work well enough in practice and ought to have been modified to achieve operational efficacy. In these circumstances, the trial judge's finding that the defendant had been "careless" is indistinguishable from negligence and amounts to a finding that the defendant had not raised even a reasonable doubt as to its due diligence.

(b) Gravity of Potential Harm

The greater the potential for substantial injury, the greater degree of care required. In *Gonder, supra*, the Court said at p. 333, "the magnitude of potential damage to the environment or to property, business or to the safety of individuals are the primary factors governing the measure of care required."

In *R. v. Gulf of Georgia Towing Co. Ltd.* [1979], 3 W.W.R. 84 (B.C.C.A.), the Appeal Court stated:

> ...due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possibly alarm systems. But in the end I am of the view that the trial judge decided -- and rightly decided -- that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake.

More than the care expected of an ordinary citizen is required of those engaged in potentially dangerous activities. At a minimum, the standard of care must reflect the diligence of a reasonable professional possessing the expertise suitable to the activity in question: *R. v. Placer Developments Ltd.* (1983), 13 C.E.L.R. 42 (Y.T.Terr.Ct.). If a corporation chooses to engage in operations which are inherently dangerous, it must accept responsibility for protecting the public from the risks they create or to which they expose the public: *Roy c. Ecole D'Escalade la Haute Perchee Inc.*, [1988] R.J.Q. 663 (Que.C.A.), leave to appeal to S.C.C. refused [1988] 1 S.C.R. viii.

(c) Alternatives Available to the Defendant

In assessing the reasonableness of the defendant's actions, a Court can compare what was done with what could have been done. The accused must establish that there were no reasonable feasible alternatives available. Again, in *Gonder, supra*, Stuart C.J. stated:

> Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were available is a primary measure of due diligence. To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities there were no reasonable feasible alternatives that might have avoided or minimized injury to others.

In *R. v. Metropolitan Stores (MTS) Ltd.* (1987), 66 Nfld. & P.E.I.R. 241 (P.E.I.Prov.Ct.), the fact that the defendant did not choose

the reasonable alternative course of action was the primary factor in the dismissal of its due diligence defence.

The economic considerations of the defendant should not affect a Court's assessment of the reasonableness of alternatives. In *Bata, supra*, the fact that the company was attempting to reduce operating losses did not excuse its decision not to implement an effective waste control system.

In *Sweet* v. *Parsley* [1970] A.C. 132, the English House of Lords also held that the cost of compliance was not a relevant issue in public welfare offences involving danger to health, public safety and morals.

This reasoning was adopted in *R.* v. *Placer Developments Ltd.* (1983), 13 C.E.L.R. 42 at 52 (Y.T.Terr.Ct.). In *R.* v. *Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S.Prov.Ct.), Curran J. says at p. 241: "Economic considerations do not relieve a defendant from the obligation of due diligence." See *Bata* sentencing decision on March 31, 1992, unreported.

(d) Likelihood of Harm

It need not be reasonably foreseeable that the prohibited event would occur in the exact manner in which it occurred for liability to arise, but Courts have accepted the defence of due diligence to a charge if it could not reasonably be foreseen that there was a potential source of danger. As noted in *R.* v. *Rio Algom Ltd.*, *supra*, the issue is not whether the accused in fact foresaw the event but whether a reasonable person would have foreseen the danger of the event occurring.

The foreseeability test was applied in *R.* v. *Canadian Forest Products Ltd.* (1978), 7 C.E.L.R. 113 (B.C. Prov. Ct.). The accused was found guilty under the federal Fisheries Act with spilling 1,000 gallons of bunker oil into water frequented by fish. The oil escaped from an oil pipe damaged by water.

The Court found that the damage to the pipe could have been anticipated and prevented had the defendant company exercised duel diligence through periodic inspections and tests of the pipe. The Court cited the decision of Morrow J. in *Canada Tungsten Mining Corporation Ltd.* v. R. (1976), 5 C.E.L.N. 120 (N.W.T.S.C.), where the Court said at p. 129:

> It is quite true as was argued that to prevent the leak in the present case, to set up inspections, to look for weaknesses in the installations such as are found at appellant's plant may be difficult. The fact of the

> matter is that no such tests appear to have ever been made since the plant was erected and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

Significantly, the Court in *Canadian Forest Products* found that the foresight required was not that of the lay person but of an "environmentally conscious engineer".

(e) Degree of Knowledge or Skill Expected of the Defendant

In *Placer Developments Ltd., supra*, Stuart Terr.Ct.J. said at p. 52:

> Unless equipped with the appropriate professional skills, no one ought to undertake any activity involving a danger to the public. The degree of professional diligence required depends upon commonly accepted practices of that specific activity and the specific circumstances.

In *R. v. Union Carbide Canada Ltd.*, Ont. Prov. Ct., August 17, 1990, Morrison J., (unreported) the defendant argued that details of neighbours complaints were not fully reported to the Ministry of the Environment. This was said to substantially delay progress in analyzing the problems. The Court found as a fact that the corporation did have details, but went on to say "the Corporation ought not to have sat back and expected the Ministry to accumulate data for it. It had an affirmative obligation to investigate and research the results and effects of the soot it was emitting on its own and independent of the Ministry, if necessary".

Persons or corporations engaging in particular activities are expected to employ the expertise necessary to avoid breaches of the law. However, hiring outside does not relieve a defendant of the obligation to monitor the functions of the expert or employee to evaluate whether the hired help is satisfactorily performing the function for which they were retained: *Canada v. J.P. Consultants Ltd.*, [1990] 2 C.T.C. 514 (Man.Prov.Ct.).

(f) Notice

Where a defendant has notice of a problem, either through internal audits, inspection, or personal observations, the standard of care applicable to that particular defendant will be increased. A key element of due diligence is reacting promptly and appropriately to notice of a problem. A corporation and its executives are only entitled to rely on an established system of prevention for so long as they are unaware that the system is defective. Once a corporation or executive has notice that an existing system is not

adequate to prevent offences, they have a duty to intervene and create a system that will be effective: *R. v. Joi-Terra Farms Ltd.* (1979), 79 N.S.R. (2d) 203 (Co.Ct.), *U.S.* v. *Park*, 421 U.S. 658 (1975).

Failure to heed warnings can be an aggravating factor, both as to culpability and as to sentence: *R.* v. *Fabricated Plastics Ltd.* (1979), 8 C.E.L.R. 174 (Ont.Prov.Ct.).

(g) Proximity of Other Sources of Pollution

The context in which the business operates may set a higher standard of care. While a single source of contaminant may not affect the environment, an accumulation of contaminants may be toxic:

> Arguments to the effect that a particular act was only of minimal or negligible impact on the total environment, "a drop in the bucket" as it were, must be rejected ... "A journey of a thousand miles begins with the first step"; the effective destruction of an environment begins with the first load of garbage.: *R.* v. *Panarctic Oils Ltd.* (1982), 12 C.E.L.R. 29 (N.W.T.Terr.Ct.) at p. 37.

(h) Sensitive Areas of Environment

People operating in remote, valuable or sensitive areas may be required to conform to a higher standard of care: *R.* v. *Placer Developments Ltd.*, *supra*. For example, the operator of a gas station failed to establish due diligence when he failed to immediately remove a leaking gas tank and all surrounding contaminated soil, because the tank was close to the aquifer which supplied a municipality's water: *R.* v. *Mac's Convenience Stores Inc.* (1985), 14 C.E.L.R. 120 (Ont.Prov.Ct.).

3. Ability of the Defendant to Control the Impugned Conduct: Limits of Due Diligence

In *Sault Ste. Marie*, *supra*, the Supreme Court of Canada said at p. 371:

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control.

In several areas, Courts have dealt with the issue of the defendant's ability to control the impugned conduct:

(a) Acts of God

An act of God is an extraordinary, natural event, that could not have been foreseen, or if it could have been foreseen would not have been guarded against by any reasonable amount of foresight. The defence is rarely successful.

In *R.* v. *North Canadian Enterprises Ltd.*, (1974) 20 C.C.C. (2d) 242 (Ont. Prov. Ct.), Greco J. said:

> While the act of God relied upon need not be unique in order to afford a defence to the accused, it must nevertheless be something quite overwhelming, not merely an ordinary circumstance which could have been foreseen and guarded against. While spring rains were generally heavier than rains at other times of the year, they were not uncommon and unknown to those who live and do business in that area. The cause of the breach of the dam was that the decant system had blocked up. The water could not escape and was forced over the top of the dam. The accused had both the power and authority to prevent the discharge complained of by making certain that the decant system was properly attended to. This surely was not beyond the power and authority of the accused.

On the other hand, in a case where a defendant corporation was charged with discharging material contrary to the Ontario *Water Resources Act* and had experienced the heaviest rainfall recorded in over fifty years, causing a pump to fail which had to be replaced, together with other evidence that the corporation had in all respects acted reasonably and diligently to process waste water, the Court found that no offence had been committed. The Court did not, however, specifically refer to the record rainfall as "an act of God": *R.* v. *Omstead Foods Limited*, August 6, 1991, Ont. Prov. Ct. (unreported).

(b) Contracting out the Work

In *Sault Ste. Marie*, *supra*, the Supreme Court of Canada determined that the absence of a statutory duty or a duty imposed by contractual agreement was not determinative of the issue. The test was a factual one based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes the prohibited activity. If the accused could and should have controlled the activity at the point where the prohibited activity occurred, then it is responsible for it.

In *Placer Developments Ltd., supra*, the Court summed up the position at p. 53 as follows:

> ...persons or corporations in positions to influence behaviour through their legislative powers, bargaining strength, expertise or other powers have a responsibility to ensure reasonable care characterizes all activities they can influence. Responsibility cannot be passed to another corporation through the simplistic manoeuvre of contracting out the project. If this simple evasion of responsibility was tolerated, corporations could be incorporated solely for the on-site work and thereby be practically immune to the sanctions of criminal prosecution.

(c) Delegating Responsibility to Employees

In *R.* v. *MacMillan Bloedel Industries Ltd.*, (1973) 13 C.C.C. (2d) 459(B.C. Prov. Ct.) the Court found the defendant company liable because:

> There was no check or supervision of the operation by senior officials during the four days it continued. I find that this falls far short of the exercise of all due diligence referred to in Section 33(8). I would emphasize, as I have before, that due diligence in my opinion, requires successful communication of adequate information and inspections from the company right down to the man on the job.

If the corporate defendant has established a proper system to prevent a violation of an environmental law and has taken reasonable steps to implement the plan, the defence of due diligence will be made out although, to the knowledge of management, employees are deliberately frustrating the plan: *Ontario (Minister of the Environment)* v. *Exolon Co. of Canada* (1981), 36 O.R. (2d) 530 (Ont. Prov. Ct.).

In *R.* v. *Primo Foods Inc.*, June 25, 1987, Ont.Prov.Off.Ct., (unreported), it was held that due diligence is not made out where there is no evidence that there was a clear line of communication between management and the operators, no written instructions concerning pollution control and no records or logs as to pollution control equipment, together with the employment of an inexperienced operator.

(d) Sabotage

A defendant should be acquitted if the defendant has an acceptable system established and has done everything to ensure it is followed, but its employees deliberately fail to follow the same: *Exolon Co. of Canada, supra*. In this case, the Court found that, but for the lack of co-operation of the corporation's employees, who failed to fulfil their duties and follow instructions. the system in place would have functioned adequately to control the emissions and prevent the pollution.

(e) Latent Defect

Latent defects which are not apparent from reasonable inspections are not examples of a lack of due diligence: *British Columbia Marine Shipbuilders Ltd. v. F.M. Yorke & Son Ltd.*, [1981] 1 S.C.R. 363.

(f) Necessity

To avert an emergency threatening human life, a person may take any reasonable measures even acts which are otherwise unlawful: *R. v. Milaster* (1983), 3 F.P.R. 403 (B.C.Prov.Ct.). This is not a defence if the emergency was a foreseeable result of one's own conduct.

In addition, in an emergency, one must still act reasonably: *R. v. Industrial Roofing and Siding Ltd.*, February 5, 1990, Prov. Off. Ct. (unreported).

(g) Impossibility

A defendant does not lack due diligence if it fails to do the impossible, or to foresee and guard against the unforeseeable. For example, in *R. v. Canchem Inc., supra*, the company was charged with failing to remove waste within the prescribed time, but was acquitted because it was impossible to do so:

> A person cannot be said to have failed to act with due diligence if he fails to do in thirty days something that could only be done in several months ... There can hardly be stronger evidence of the impossibility of removing the wastes in thirty days than the time actually taken by the government. (at p. 241).

The fact that an act is time consuming, difficult or expensive does not make it "impossible": *Canadian Forest Products, supra*.

D. Defences Related to Due Diligence

1. Reasonable Belief in Mistaken Set of Facts

A reasonable belief in a mistaken set of facts, which, if true, would render the act or omission innocent is a defence for most environmental offences which are strict liability offences. Mistake of law is not a defence. It must be stressed that unlike a true criminal or a *mens rea* offence where the mistaken belief need only be genuine or honestly held, in a strict liability offence the mistaken belief must be an honest and reasonable mistake of fact. In other words, the defendant must take reasonable steps to inform himself of the true state of affairs. Second, the defence is not available if the defendant knew the true facts but simply failed to draw the correct conclusion as to the risk of an accident or error: *Rio Algom Ltd.*, *supra*.

The defence of reasonable belief in a mistaken set of facts is not available in cases of wilful blindness; belief in a mistaken set of facts must be reasonable. In *R.* v. *Shamrock Chemicals Ltd.* (1989), 4 C.E.L.R. (N.S.) 315 (Ont. Dist. Ct.), the president of a corporation was convicted after his company was found guilty of discharging a material having the potential to impair the quality of water. The offence contravened the Ontario *Water Resources Act*. Despite his claim that he reasonably believed the liquid to be ordinary rain water, the Crown proved that a government inspector had specifically warned the company that the material was contaminated with fertilizers and sulphuric acid.

By way of contrast, a Court should make no finding of guilt in a case involving a corporate officer who reasonably believes that vibrations and noise emanating from his plant are well within prescribed guidelines, even though his belief may be mistaken: *R.* v. *D&L Metals Limited*, July 8, 1991 Ont. Prov. Ct. (unreported).

2. Mistake of Fact v. Mistake of Law

In *R.* v. *Belter* (1990), 10 W.C.B. (2d) 195 (B.C. Co. Ct.), the accused had been acquitted at trial on the ground that he had exercised due diligence in attempting to determine the applicable regulation. A new trial was ordered on appeal. The defence of due diligence relates to efforts to fulfil a legal duty, and not to efforts to determine what that legal duty is.

In *R.* v. *Denton* (1991), 105 N.S.R. (2d) 357 (S.C.A.D.), the accused was charged and convicted with fishing in a closed area. The accused erroneously believed that he was only "fishing" while his net was actually in place and open on the sea bottom. He had

begun to lift the net before entering the closed area. It was held that "fishing" extended from the time that preliminary preparations were made to take fish until the moment when the fish were reduced to actual and certain possession in the boat. The accused's belief that he was not "fishing" in the closed area was a mistake of law and did not amount to due diligence.

3. Officially Induced Error

In *R.* v. *Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295, (Ont. C.A.) the Court observed that the defence of officially induced error may "at times overlap with the defence of due diligence", but is in law a "separate and distinct" defence and can be asserted as a separate and distinct defence in the same way as other defences. At p. 304 the legitimacy of this defence was recognized in the following terms:

> Where the advice is given by an official who has the job of administering the particular statute, and where the actor relies on this advice and commits what is in fact an offence, even if the agency cannot be estopped, does it follow that the actor should not be excused? To do so is not to condone an illegality or say that the agency is estopped into a position of illegality, but to recognize that the advice was illegal but excuse the actor because he acted reasonably and does not deserve punishment.

The Supreme Court of Canada commented on this defence in *R.* v. *MacDougall* (1983), 1 C.C.C. (3d) 65. The Court unanimously held that s. 19 of the *Criminal Code* was an accurate and applicable codification of the common law rule that ignorance of the law is no excuse for the commission of an offence. Still, the Court said, ignorance of the law induced by an official of the government could be treated differently.

Thus, the defence of officially induced error is available as a defence to an alleged violation of a regulatory statute "where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law.": *Cancoil Thermal Corp.* at p.303.

The reasonableness of the accused's belief is a question of fact based on a number of factors: (1) the efforts he made to ascertain the proper law; (2) the complexity or obscurity of the law; (3) the position of the official who gave the advice; and (4) the clarity, definitiveness and reasonableness of the advice given: *Cancoil Thermo Corp.*, *supra*, at p.303.

The person claiming the defence will be called upon to prove it by a preponderance of evidence.

4. Other Defences

(a) Abuse of Process

A Court has the power to stay proceedings when to compel a defendant to stand trial would violate fundamental principles of justice underlying the community's sense of fair play and decency and constitutes an abuse of the Court's process through oppressive or vexatious proceedings. The power to stay proceedings, however, is exercised only in the clearest of cases.

The onus of establishing an abuse of process is on the defendant on a balance of probabilities. The abuse alleged must be an abuse by the Crown. It is not sufficient to show oppression or bad faith on behalf of the complainant: *R. v. Miles of Music Ltd.* (1989), 48 C.C.C. (3d) 96, 74 O.R. (2d) 518 (C.A.).

In *Kostuch v. Alberta (Minister of Environment)* (1991), 27 A.C.W.S. (3d) 991, 13 W.C.B. (2d) 421 (Alta. Q.B.), the Court found that it was not an abuse of process for a private citizen to lay multiple information arising out of the construction of a single dam, with a view to preventing construction, where through no fault of the informant none of the previous six informations had been heard on the merits.

In *R. v. Zalev Brothers Ltd.*, [1989] O.J. No. 1658, (Ont.Dist.Ct.), the defendants appealed a decision of the trial judge in dismissing their motion to stay the proceedings based on abuse of process. In dismissing the appeal, McMahon D.C.J. states:

> As set forth in R. v. Jewitt, 21 C.C.C., (3d) p.7, and R. v. Young, 13 C.C.C. (3d) p.1, the defence of abuse of process should only be allowed and upheld in the clearest of cases. Certainly any prosecution of any nature is prejudicial to the accused person. In my view the only time that the abuse of process defence can be or should be permitted is when the prosecutorial authorities have acted in such a manner as to completely deceive or hamper or entrap an accused person in a way that would bring the administration of justice into disrepute. It is not the function of the Court to interfere lightly in the prosecutorial process. Any delay complained of by the accused occurred prior to the commencement of the prosecution and therefore does not fall within the ambit of the *Charter* of Rights and Freedoms.

(b) De Minimis: Uneven Enforcement

Environmental legislation applies even to small parts of the environment such as unnamed streams and even if the streams have been already degraded by other human activity. It is no defence that the damage caused by the particular offender is less than the damage caused by other companies, whether or not those other offenders have been punished for their acts. An individual may be prosecuted and convicted for environmental damage resulting from logging a small area whether or not major logging companies have been prosecuted and convicted for the environmental devastation they have caused. "The destruction of any environmental ecosystem is indeed a gradual process effected by cumulative acts. Each offender must bear responsibility for the final result": *R.* v. *Tuck*, B.C. Prov. Ct., May 27, 1991, (unreported).

E. Application of the Standard of Care

The accused is required not to show it exercised some care but that the degree of care was sufficient to meet the standard imposed. Case law is only beginning to develop as to definition of the appropriate standard of care in environmental cases. However, D. Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability*, Canada Law Book Inc. (1990), suggests that the following factors be considered in assessing whether the appropriate standard of care has been met:

1. **Audits/Inspections:** A regular system of environmental audits or inspections are elements of due diligence. Environmental audits were singled out as an element of due diligence in *R.* v. *Placer Developments Ltd.*, *supra*.

Also, in *R.* v. *Rio Algom Ltd.*, *supra*, the defendant did not show due diligence because its management did not know about (and therefore did nothing to correct) hazards that would have been discovered by a thorough inspection or audit.

Where visual inspections do not reveal enough required information, proper samples must be taken and analyzed: *R.* v. *Shamrock Chemicals Ltd.*, *supra*. Inspections must be frequent enough to be reasonably likely to prevent the offence.

2. **Government Inspections:** The fact that government inspections are carried out and results considered to be satisfactory may be some evidence of due diligence, although not conclusive: *R.* v. *Rio Algom Ltd.*, *supra*. Also, following the advice of responsible government officials as to recommended repairs or as to an

appropriate system to prevent offences is evidence of due diligence: *Norman* v. *Canadian National Railway* (1982), 39 Nfld.& P.E.I.R. 91 (Nfld.C.A.); *R.* v. *Longmire* (1988), 83 N.S.R. (2d) 266 (Co.Ct.).

3. **Employee Training and Information:** Due diligence must include appropriate employee hiring and training. An example of an adequate program of training and inspection was found in *R.* v. *Steinberg's Ltd.* (1977), 80 D.L.R. (3d) 741 (Ont.Prov.Ct.) at pp. 748-9:

> ... an elaborate scheme of employee training and education as to governmental regulations and requirements, and compliance therewith - this included manuals, oral expositions, direct discussions with affected personnel both as individuals and at group meetings; an on the job site inspection scheme, designed to accustom every employee concerned with the marketing of meat to inspect the meat counter at regular and irregular intervals - even directors and senior "head office" personnel of the company were instructed to do this as of course were store managers, meat managers and meat packer.

4. **Staffing Levels:** It is not due diligence to employ one person, no matter how highly trained, when the nature of the activity requires hiring two persons to perform it safely: "*Gulf Hathi*" (The) v. *R.* (1981), 121 D.L.R. (3d) 359 (B.C.C.A.).

5. **Environmental Policies:** Written policies setting out the corporation's agenda may be evidence of due diligence, but the corporation must go further and show that the policies were implemented and followed: *Aberdeen Paving, supra; Bata Industries, supra.*

6. **Experts/Independent Contractors:** When internal expertise is lacking, due diligence may require outside experts and consultants to be retained. An outside expert may be necessary even for tasks which a company is used to performing for itself, if the task is necessary to avoid serious risks and especially if its in-house staff is not as expert as those readily available elsewhere:

> The awesome progress of technological knowledge in our time has not only widened the gulf between amateur and expert, but also entailed a continuously rising expectation regarding the level of competence for performing a multitude of task that only yesterday were regarded as quite commonplace and within anybody's grasp: Fleming, The Law of Torts, 7th ed., 1987, at p. 102.

However, responsibility may not be fully and completely delegated to the consultant as the person responsible remains primarily responsible for compliance.

7. **Environmentally Conscious Equipment Design:** Due diligence requires a person to acquire and use equipment designed to avoid environmental damage as far as possible. However, it is not necessary to acquire equipment if it is not known to be useful: *Dow Chemical, supra*, and it may be reasonable to make progressive upgrades of pollution controls where there are no exigent circumstances. In *R.* v. *Northern Pigments Ltd.*, Ont. Prov. Off. Ct., May 29, 1991 (Unreported), the corporation was acquitted of "causing or permitting" the escape of pigment. The company had experienced continuing problems with the escape of pigment from a conveyor belt from the time of its construction, despite a series of increasingly expensive remedial measures. After the charges were laid, additional funds were expended which finally resolved the problem. The Court held that the defendant had done everything they could to deal with the problem, and that it was reasonable for them to have begun their efforts with inexpensive measures. They showed due diligence because they continued to gradually improve their controls in response to problems in their performance.

8. **Older Equipment:** This is not necessarily evidence of negligence or lack of due diligence, but it may not be an excuse to meet regulatory requirements. See *Re Industrial Hygeine Division No. 167*, (1975) 2 W.C.R. 234 at p. 252.

The key consideration for the Courts is the potential risk posed by the ongoing use of the old technology. Those engaged in ordinary activities cannot be constantly obliged to replace working equipment with the very latest thing. However, those who engage in hazardous activities may be negligent if they fail to promptly adopt new and improved devices, even if the device has only recently been discovered: *Mercer* v. *Comm. Road Transport* (1936), 56 C.L.R. 58.

9. **Unproven Technology:** Employment of new and unproven technology can amount to due diligence, if applied in good faith and with the true intent of avoiding environmental damage. However, if the experiment fails, causing pollution, in cases of lack of diligence on the defendant's part, due diligence will not be made out: *R.* v. *Boise Cascade Canada Ltd.*, Ont. Prov. Ct., February 11, 1980 (unreported).

10. **Adequate Capacity:** Increased production often outpaces the capacity of emission and waste controls. If these controls are not modified it may be proof of lack of due diligence:

> The corporation through its officers knew of the limited capacity of the [waste] storage system and that it was inadequate having regard to the significantly increased demands which had been placed upon the system by an increase of approximately forty percent in the production of the plant in the previous two or two and one half years from the date of the last approval of its sewage works. Given those circumstances of increased production, the defendant corporation should have foreseen the probability of a waste discharge and that such would be the natural result of a system which had been pushed beyond its limits of tolerance: *R.* v. *Spataro Cheese Products Ltd.* (1981), 10 C.E.L.R. 128 (Ont. Prov. Offences Ct.).

11. Maintenance: Due diligence requires adequate, regular maintenance of all equipment whose failure could risk an offence.

12. Reporting: There must be a system in place to ensure spills are immediately reported and contained, since reporting is statutorily required. Due diligence in reporting spills requires the company to ensure that all staff are aware of the obligation to report and know the role they must play in fulfilling that obligation, both as to timing and as to content: *R.* v. *Ontario Hydro*, Ont. Prov. Ct., November 26, 1986 (unreported) *R.* v. *Gordon's Greenhouses Ltd.*, *supra*.

13. Emergency Planning: Contingency plans to deal with potential accidents must be in place: *R.* v. *Metropolitan Stores*, *supra*.

14. Security/Vandalism: Access to hazardous waste storage sites must be strictly regulated. Vandalism is not a defence where hazardous materials are kept by sophisticated companies under conditions that permit vandals to have access to them. Those with charge and control of substances which could cause serious environmental damage, should they escape, must take precautions to prevent access to those substances.

VIII. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND ENVIRONMENTAL LAW*

A. General Discussion

In 1982 the *Canadian Charter of Rights and Freedoms* was enacted. The Charter's focus on individual rights, to be protected from unreasonable interference by government, makes it inevitable that a number of provisions will affect on the way environmental laws are implemented by various levels of government. The Charter, as interpreted by Canadian courts, sets standards for search and seizure, punishment and enforcement, criminal procedures, and general court procedures. Case law, in the first decade since the implementation of the Charter, has been numerous on these general principles. A number of cases have been from the environmental area.

The accused can argue the law is unconstitutional as it violates rights guaranteed in the *Charter*. The accused can also argue actions taken by the enforcement officers violated the *Charter*. *R. v. Bata Industries Limited, supra.*

One thing remains uncertain, however. Does the Charter provide for environmental rights, or is its effect on environmental issues limited to procedure? Are any of its provisions to be interpreted to provide for an individuals rights to a healthy or clean environment? The preliminary answer, based on case-law to date, appears to be no. Section 15 has, to date, not been applied to a healthy environment. Section 7 appears to be limited in application to cases where human health is threatened as a result of damage to the environment. These two sections are the most likely provisions of the Charter to be used in any claim to a right to a healthy environment. The remaining sections are more likely to provide guidance about the procedures to be followed in protecting the environment without infringing individual rights unreasonably.

B. Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Note:

This provision allows for reasonable limits to be placed on the individual rights guaranteed in the remaining sections of the *Charter*. Those reasonable limits have to be prescribed by law, and they have to be demonstrably justified in a free and democratic society. The latter requirement has been interpreted to include the following:

(a) it has to be for the purpose of achieving important public objectives;

(b) it has to be necessary and useful to achieve those objectives;

(c) it cannot be wider than necessary to achieve those objectives.

R. v. Oakes (1986), 50 C.R. (3d) 1 (S.C.C.) sets out the test for determining when such justification will be successful.

Whenever a breach of another section of the *Charter* has been shown, the onus shifts to the Crown to show that the breach is justified under this provision.

Environmental cases:

R. v. Ellis-Don Ltd., Supreme Court of Canada, March 31, 1992, Lamer, C.J., LaForest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ. (unreported) (22297) reversing (1990), 61 C.C.C. (3d) 423 (Ont. C.A.)

R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193259 (S.C.C.).

R. v. Bata Industries Limited , Ontario Court of Justice, Provincial Division, February 7, 1992, Ormston J. (unreported).

C. Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion, and expression, including freedom of the press, and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association.

Note:

There is no indication so far that any of the fundamental freedoms guaranteed in this section will be interpreted to include a right to a clean or healthy environment. The likelihood of a link between any of these fundamental freedoms and environmental issues must be seen as remote without a fundamental shift in the interpretation of these rights.

D. Life, Liberty and Security of Person

7. Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Note:

Even though this section is one of the most litigated provisions of the *Charter*, its scope is still relatively unclear. General case law has established that "everyone" in s.7 includes corporations. The rights listed in this section, however, appear to refer primarily to human individuals, not to corporations. Property rights are not protected in this provision. The result of this somewhat limited interpretation appears to be that the right to a clean or healthy environment is only protected in so far as it effects human health and safety. To what extent this link between a clean environment and human health and safety will have to be established in a particular case to show that damage to the environment threatens an individual's right to "life, liberty," or "security of the person", is far from clear. If a right to a clean and healthy environment will be established under the *Charter*, it is in s.7 that it will most likely be found.

Environmental cases:

Aluminum Co. of Canada v. Ontario (Minister of Environment) (1986), 1 C.E.L.R. (N.S.) 1 (Ont. Div. Ct.)

Operation Dismantle Inc. v. R. (1985), 18 D.L.R. (4th) 481 (S.C.C.)

R. v. Weil's Food Processing Limited, (1992), 6 C.E.L.R. (N.S.) 249, (Ont. Div. Ct.)

Wholesale Travel Group Inc., supra.

Manicom v. Oxford (County) (1985), 21 D.L.R. (4th) 611 (Ont. Div. Ct.).

R. v. Vandervoet (1986), 26 C.R.R. 173 (Ont. Prov. Ct). Statutory duty to furnish information does not violate the Charter (right not to incriminate oneself).

R. v. B.E.S.T. Plating Shoppe (1986), 1 C.E.L.R. (N.S.) 145 (Ont. C.A.).

R. v. Bata Industries Limited, supra. Accused argued standards to be met by directors were vague and imprecise and so violated s.7 of *Charter*. Argument dismissed. *Canada v. Pharmaceutical Society* (Nova Scotia) (1991), 80 D.L.R. (4th) 206 (N.S.S.C.A.D.) followed.

E. Search and Seizure

> *8. Everyone has the right to be secure against unreasonable search or seizure.*

Note: See article by Doyle, *Search and Seizure by Environmental Authorities*, in *National Issues in Environmental Law* sponsored by the Canadian Bar Association, November 1991. In regulatory offences there are some valid arguments for relaxing the more formal rules established in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.).

Environmental cases:

Bertram S. Miller Limited v. R. (1987), 1 C.E.L.R. (N.S.) 16 (F.C.A.).

R. v. Island Farm and Fish Meal, P.E.I., S.C.T.D., May 1, 1991, Matheson J. (unreported) held Ministerial Order to shut down a business on no reasonable and probable grounds was a seizure.

F. Detention or Imprisonment

9. *Everyone has the right not to be arbitrarily detained or imprisoned.*

G. Arrest or Detention

10. *Everyone has the right on arrest or detention*

a) *to be informed promptly of the reasons therefore;*

b) *to retain and instruct counsel without delay and to be informed of that right; and*

c) *to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.*

Note:

Enforcement officers cannot ask questions or seize any evidence before advising a detained person of their right to counsel.

H. Proceedings in Criminal and Penal Matters

11. *Any person charged with an offence has the right*

a) *to be informed without unreasonable delay of the specific offence;*

b) *to be tried within a reasonable time;*

c) *to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*

d) *rule against double jeopardy; and*

e) *not to be compelled to be a witness in proceedings against that person in respect of the offence.*

Note:

Most of the rights prescribed apply to prosecutions. They do not apply to regulatory procedures such as control orders or stop orders.

Environmental cases:

Ellis-Don Ltd., supra (reverse onus).

Wholesale Travel Group Limited, supra (reverse onus).

Eagle Disposal Systems Limited v. Ontario (Minister of Environment) (1984), 12 D.L.R. (4th) 639 (Ont. C.A.). An administrative order does not bar a prosecution and vice versa (double jeopardy).

R. v. Bata Industries Limited, supra.

I. Treatment or Punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

J. Self-Incrimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.

Note:

Evidence give by anyone in a court or similar proceeding cannot be used later in a proceeding against that person either by reading it into the evidence or by cross examining him/her on it even in a second trial on the same charges.

R. v. St. Michael's Hospital (1987), 2 C.E.L.R. (N.S.) 327 (Ont. Dist. Ct.). Right not to be compelled as a witness.

K. Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Note:

So far, it would appear that this provision, unlike s. 7, does not apply to corporations. Even for individuals, however, the burden of proving discrimination is onerous. The potential remains for challenges based on the right to equality. Such challenges are conceivable both of government action that is intended to prevent pollution, and government action which allows pollution. If a court finds that a government action in respect of environmental regulation is in violation of s. 15(1), it may either be considered an affirmative action under s. 15(2), or a reasonable limit under s. 1.

Environmental cases:

Aluminum Co. of Canada v. Ontario (Minister of Environment) (1986), 1 C.E.L.R. (N.S.) 1 (Ont. Div. Ct.).

L. Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Note:

Any evidence obtained following (not necessarily because of) a *Charter* breach will be excluded, if the trial judge thinks it's admission could bring the administrator of justice into disrepute. Key considerations are the good faith of the officers and severity of the breach.

M. Regulatory vs. Criminal Offences

Cory J. in the Supreme Court of Canada decision *Wholesale Travel Group Limited, supra,* held that regulatory offences (federal) merited different considerations than criminal offences. In regulatory offences the reasonable expectation of privacy is lowered. Because so much information in only known to the accused, the Court held *mens rea* was not required (no violation of s.7) and the shifting of the evidential burden (reverse onus) did not violate s.11(d) of the *Charter*. The principles established in *Sault Ste. Marie, supra,* in 1978, had withstood its first serious *Charter* challenge. In *R. v. Ellis-Don Limited, supra,* the Supreme Court of Canada came to the similar conclusion with respect to provincial regulatory offences.

IX. SENTENCING

A. Introduction

It is a moot point whether public welfare offences generally, and environmental cases specifically, require a different approach in sentencing than criminal cases.

R. v. *Kenaston Drilling (Arctic) Limited* (1973), 12 C.C.C. (2d) 383, (N.W.T.S.C.) involved a guilty plea to the offence of unlawfully conducting a land use operation in a land management zone. Morrow J. held that:

> It is my opinion that offences such as is provided for in the present legislation require perhaps a special approach. I would be remiss as a judge in this territory if I did not take notice of the need and purpose of the present legislation, to protect the "control and use of the surface of the land", a land which although tundra in nature and frozen over for many months each year is nonetheless a delicate land, easily damaged and perhaps once damaged impossible to repair . . . It may very well be that in the present case no actual damage took place. But surely the test to apply in approaching the question of sentence should be less a concern of what the damage was but more concern of what the damage might have been.

A similar view was expressed by Stuart J. of the Yukon Territorial Court in the leading case of *R.* v. *United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43 (Y.T. Terr. Ct.) where he stated that pollution is a crime and not a morally blameless technical breach of a regulatory standard. A somewhat different approach was taken by another Territorial Court Judge in *R.* v. *Echo Bay Mines Ltd.* (1980), 12 C.E.L.R. 38, (N.W.T.Terr.Ct.) where it was held that the usual sentencing factors applied in environmental matters and that one factor was not to be stressed to the exclusion of another.

Regardless of the outcome of the debate, the problems inherent in sentencing for environmental offences are easily recognized. Without purporting to be an exhaustive list, the range of "criminality" can be extreme, the toxicity of the substances discharged may vary greatly with a correspondingly broad spectrum of harm inflicted on the environment, and with the vast majority of environmental offenders being corporations significant differences exist in the ability to pay fines or fund remedial work. In addition, the plethora of environmental statutes and regulations present the broadest possible range of fines. In some cases a

single incident may be prosecuted under a number of different statutes each containing a different fine structure and/or sentencing options.

It was perhaps in recognition of the difficulties associated with sentencing in environmental matters that the Nova Scotia County Court has recently issued a plea for uniformity in the sentencing process, whilst recognizing that each case must be considered on its own facts. *R.* v. *Oxford Frozen Foods* Ltd. (1989), 5 C.E.L.R. (N.S.) 37 (N.S.Co.Ct.) . The following section considers the recognized factors against which an offender's conduct are to be measured in arriving at the appropriate sentence.

B. Sentencing Objectives/Principles

1. **General**: The purpose of sentencing an offender is to protect the public, to deter and rehabilitate the offenders, to promote compliance with the law and to express public disapproval of the act. See *R.* v. *Bata Industries Limited*, unreported sentencing decision of Judge Edward Ormston, dated March 30, 1992.

2. **Respect for the Law**: *R.* v. *Gulf Canada Corporation* (1987), 2 C.E.L.R. (N.S.) 261, (N.W.T. Terr.Ct.), Judge Bourassa stated:

> In a narrow way, it is noted the environment that is compromised in this kind of case. The plans, process, system and future are the victims of permit infractions. Legislative goals and objectives are undermined; disrespect for the law is engineered... These considerations, in turn, direct us to a particular sentencing goal, which must be to uphold the law itself over and above other considerations.

3. **Deterrence**: In *R.* v. *Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.) the Court recognized the significance of public welfare offences. The Court stated at pages 294-295:

> In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed by offending corporations... Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence... Without

> being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity.

The Court made it clear that deterrence was important in both a positive and negative aspect. By emphasizing community disapproval of an act and branding it as reprehensible, this has a moral and educative effect and thereby affects the attitude of the public. Society expects basic rules be established and enforced to protect the physical, economic and social welfare of the public. *R.* v. *Bata Industries Limited*, *supra*.

4. **Potential v. Actual Harm**: Even when no actual harm has taken place, the Courts have been prepared to impose substantial penalties because of the harm inflicted upon the process of environmental protection. *United Keno Hill Mines*, *supra*.

5. **Economic Situations**: Even in the bleakest of financial times, the environment must not be a sacrificial lamb on the altar of corporate survival. *R.* v. *Bata Industries Limited*, *supra*.

C. Specific Sentencing Factors

1. Nature of the Environment at Risk

Damage to environmentally sensitive unique ecological areas should be given higher penalties than less sensitive areas.

R. v. *United Keno Hill Mines*, *supra*, at 47:

> A unique ecological area supporting rare flora and fauna, a high use recreational watershed, or an essential wildlife habitat, are environments calling upon users to exercise special care. Any injury to such areas must be more severely condemned than environmental damage to less sensitive areas.

2. Extent of Damage

The penalty should reflect the degree of damage inflicted. In the absence of actual damage, potential damage should also be considered. The jurisprudence conflicts as to whether the absence of actual harm is a mitigating factor.

R. v. *United Keno Hill Mines*, *supra*, at 47:

> As in assault offences the more severe the beating the greater the condemnation expressed in sentencing.

Held, substantial penalty is inappropriate where there is minimal actual damage.

R. v. *Northwest Territories Power Corp.* (1990), 5 C.E.L.R. (N.S.) 57, rev'd in part by (1990), 5 C.E.L.R. (N.S.) 67 (N.W.T. S.C.). The absence of environmental harm is not a mitigating factor.

Cf.R. v. *Jackson Bros. Logging Co.*, [1984], 4 W.W.R. 563 (B.C. Co. Ct.). The absence of irreversible harm was held to be a mitigating factor where the offender's conduct was not deliberate or reckless.

R. v. *New Brunswick Electric Power Commission*, N.B. Prov. Ct., July 8, 1991, (unreported), at 11-12:

> . . . in many of these cases, the damage that actually took place is not properly measurable over a one-day span or one-hour span or whatever. And so we can do the test studies several days, several weeks, several months later, but what damage actually took place, we don't know. So I am of the opinion that, and I have repeated this in various ways three or four times, but the potential for damage is a very important factor to be considered by the Courts.

In *R.* v. *Bata Industries Limited*, *supra*, the Court held the damage was not irreparable, extensive or likely to have numerous consequential adverse effects. This was a mitigating factor.

It is noteworthy that Crown prosecutors have been encouraged to call expert technical evidence as to the extent of environmental damage inflicted. *R.* v. *United Keno Hill Mines*, *supra*, at 47-48.

3. Criminality of Conduct

The severity of punishment should be directly related to the degree of criminality inherent in the matter of committing the offence. It is to be noted that not all "environmental" offences are strict liability in that *mens rea* may be a constituent element of the offence itself (see for example s. 145 Ontario *EPA*). Where offenders act maliciously, deliberately or openly violate the law, the penalty should be more severe.

R. v. *United Keno Hill Mines*, *supra*, at 49:

> The severity of punishment should be directly related to the degree of criminality inherent in the manner of

> committing the offence. Accidents, innocent mistakes, and not reasonably foreseen events are less damnable than wilful surreptitious violations.

R. v. *Panarctic Oils Limited*, [1983] N.W.T.R. 143, 155 (N.W.T. Terr. Ct.). Deliberateness of offence was a major factor in sentencing:

> An analysis of all these [sentencing] factors leads me to the conclusion that virtually every element required for the "worst case category" is present. The corporate defendant, by calculatingly ignoring the obligations upon it in the circumstances in which it found itself has appropriated itself into the position reserved for worst offenders on each of these offences for which it is convicted.

R. v. *Gulf Canada Corp.* (1987), 2 C.E.L.R. (N.S.) 261 (N.W.T. Terr. Ct.). Larger fines were warranted for the counts occurring after permission to dump at sea refused. The Court noted the need to promote respect for the law and the process of environmental protection.

R. v. *B.E.S.T. Plating Shoppe Limited* (1986), 1 C.E.L.R. (N.S.) 85 Ont. H.C.). A corporation was fined $100,000 for contempt of Court in refusing to obey a prohibition order.

R. v. *MacMillan Bloedel Limited* (1983), 3 F.P.R. 335 (B.C.Prov.Ct.). Accidental spill resulted in a fine of $4,000 under the Fisheries Act. The Crown appealed the sentence. The accused had previous convictions and the maximum fine was $100,000. Held, the fine was upheld.

R. v. *Bata Industries Limited*, *supra*. No surreptitious dumping. Negligent behaviour. Maximum penalties are reserved for cases involving deliberateness, recklessness and cavalier disregard for the law.

4. Size and Wealth of Corporation

R. v. *United Keno Hill Mines*, *supra*, at 50:

> Courts take judicial notice to the size and wealth of a corporation. . . The larger the corporation, the larger the fine. . . Conversely, smaller operations are not fined as severely for similar offences. This approach is principally motivated by the desire to ensure the fine imposed in the case of large corporations is not readily absorbed as a simple cost of doing business, or as a mere

> slap on the wrist. In the case of smaller corporations, the Court's attempt to avoid destroying the economic viability of the corporation by imposing a crippling fine.

R. v. *Canadian Marine Drilling Limited*, [1984] N.W.T.R. 48, 51-52; A.R. 359. A small corporation accused which is a subsidiary of a larger corporation should not receive a reduction in fine because of its size:

> As the evidence has disclosed, the defendant is a wholly owned subsidiary of Dome Petroleum, and I believe the court must be on guard to see that the large corporations do not avoid larger fines or responsibility for their illegal actions by establishing a network of small corporations.

R. v. *Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237, p. 264 (N.S. Prov. Ct.):

> I am not sure that the ability of a company to pay a fine is a significant consideration when determining what the level of a fine should be. The ability of an individual to pay a fine is very significant, but that is in large part because the alternative to paying a fine is going to jail.

There is precedent to support the notion that municipal corporations should be treated no differently than other large corporations. In particular, arguments which suggest that because the taxpayer will ultimately have to pay any fine this should be considered a mitigating factor in sentencing have been rejected. *R.* v. *The Corporation of the Township of Charlottenburg* (Township), Ontario Provincial Court, August 7, 1976, Levisk J. (unreported).

Courts are prepared in environmental cases to lift the corporate veil. Large corporations cannot avoid large fines by establishing a network of small corporations. *R.* v. *United Keno Hill Mines*, supra. See *R.* v. *Brunswick Mining and Smelting Corporation*, New Brunswick Provincial Court, July 8, 1991, (unreported), where the Court would not lift the veil.

5. Profit Realized from the Offence

A related consideration is whether the offender is reaping the "fruits of the crime". Pollution fines should not be viewed as a mere cost of doing business.

R. v. United Keno Hill Mines, supra, at 51: amount of saving or gain as a result of offence is to be considered in sentencing. "Thus the amount of illegally realized windfall should establish in almost every case, in the absence of other outstanding mitigating circumstances, the minimum fine."

6. Previous Record

R. v. United Keno Hill Mines, supra, at 51:

> A prior criminal record is especially important in sentencing corporations. Similar recidivistic conduct raises an assumption that the corporation is more concerned about profit than compliance.

R. v. St. Lawrence Fluorspar Limited (1989), 80 Nfld. & P.E.I.R 171 (Nfld. Prov. Ct.). Lack of prior conviction was a mitigating factor.

R. v. B.E.S.T. Plating Shoppe Limited, supra. Prior convictions were an aggravating factor.

D. Mitigating Factors

1. Remorse

R. v. United Keno Hill Mines, supra, at 49-50:

> Talk is cheap, action speaks much clearer to the courts about the degree of corporate contrition than the smoothest of apologies enunciated by counsel. The actions underlying genuine contrition can take three principal forms.
>
> Speed and efficiency of corporate action to rectify the problem or clean up the pollution is the clearest indication of corporate remorse. . .
>
> Voluntary reporting the violation to authorities indicates a genuine desire to act responsibly. The bulk of environmental regulation depends upon the integrity of corporations to provide full disclosure of the impact of their operation on the environment. Voluntarily reporting breaches must be acknowledged as a mitigating circumstance by the courts in sentencing. Pleas of guilty are not of any significance if detection and conviction were inevitable. . .

> The personal appearance of corporate executives in court and their personal statement outlining the company's genuine regret and stating future plans to avoid repetitions of such offences is another indication of genuine corporate contrition. Too often corporations appear solely by agents, through their lawyer, or through a lesser functionary of the company. This practice suggests the lack of significance the company accords the offence. If the court is to properly assess the degree of sanctions required to affect a full rehabilitation of the offending corporation, the governing or guiding mind, in the person of senior executive officers, should be present and give evidence.

R. v. *Placer Development Limited* (1985), 4 F.P.R. 366, (Y.T. Terr.Ct.). Reporting of spill and presence of senior corporate executives at trial were evidence of remorse and indicated the corporation's appreciation of the seriousness of environmental offences.

R. v. *Canadian Marine Drilling Limited*, *supra*, at C.E.L.R. 53. Clean up costs not to be considered as mitigating factors given that they are incurred as a direct result of the defendant's own conscious acts and omissions.

2. Guilty Pleas

The Courts appear to be divided on the question of whether a guilty plea should be of any significance to the sentencing question.

R. v. *Inland Shake and Shingle Limited* (1987), 3 W.C.B. (2d) 405 (B.C. Co. Ct.). Guilty plea a mitigating factor.

R. v. *Canadian Marine Drilling Limited*, *supra*, at 53. Where the accused is inescapably caught, a guilty plea is not a factor.

R. v. *York Sanitation Co. Ltd.* (1978), 8 C.E.L.R. 146 (Ont. Prov. Ct.). Avoidance of a lengthy and expensive trial considered as a mitigating factor.

The study paper of the Law Reform Commission of Canada entitled *Sentencing in Environmental Cases* (1985) offers an interesting discussion on the cost of environmental prosecutions and the utility of guilty pleas (pages 31 et seq.). Of particular interest is the recommendation that guilty pleas not be considered mitigating factors where the plea is entered at the last minute after considerable time and expense have been expended and where the decisions could have been made at an earlier date.

3. Laxity of Government Agencies

R. v. *United Keno Hill Mines*, *supra*, at 58:

> The evidence suggests government patience and tolerance partially explains the prolonged period of the persistent licence violations. In the absence of any explanation by the Crown to the contrary, I must give the benefit of the doubt to the corporation and avoid any significant negative inferences emanating from the extensive period of operating in excess of licensing requirements.

R. v. *Placer Developments Limited*, *supra*, a spill partly caused by poor inspections of officials was seen as a mitigating factor.

4. Excessive Government Standards

R. v. *United Keno Hill Mines*, *supra*, at 58. It is the responsibility of the corporation to meet its licence requirements, not the responsibility of the government to conceive or implement a plan to achieve that objective. However, in the absence of evidence that reasonable environmental management is fostered by government standards, some mitigation in sentence is appropriate when there is evidence that the company is striving to meet the standard.

5. Recognition of Technological and Economic Realities

R. v. *North Vancouver (District)* (1982), 11 C.E.L.R. 158 (B.C. Prov. Ct.) affirmed (1983), 3 F.P.R. 491 (B.C. C.A.). Consideration is to be given to circumstances where the pollution results from the use of a system which conforms to accepted engineering practices and alternative technology though available was expensive and had to be phased in over a period of time.

6. Attempts to Comply

Efforts of the offender, including expenditures in environmental aspects will be considered mitigating factors by the Courts. *R.* v. *United Keno Hill Mines*, *supra*.

R. v. *Bata Industries Limited*, *supra*. The public purse was not strained in cleaning up the environment. Over $448,173 plus legal fees for a 27 day trial were expended by the company.

E. FINES

1. Introduction

Both the maximum allowable and fines actually handed down are increasing. In 1989, environmental fines in Nova Scotia were increased to $50,000 maximum on first conviction (or one year imprisonment in default) and $75,000 maximum on second conviction (or two years imprisonment in default). See for example *Environmental Protection Act* s. 48, *Pest Control Products (Nova Scotia) Act* s. 27, and *Water Act* s. 20. The *Canada Shipping Act* now provides for a $250,000 maximum. In a case tried in October, 1990, in the Nova Scotia Provincial Court before Judge Oxner, the OOCL Europa was fined $25,000 under the *Canada Shipping Act* for discharging approximately 5 barrels of oil in a Canadian fishing zone.

2. Daily Fines

The Nova Scotia legislation provides for daily fines (s. 48 *EPA*). Where pollutants are released on successive days, they are treated as separate offences.

3. Minimum Fines

Some environmental legislation provides for both minimum and maximum fines. The *General Litter Abatement Regulations* (s. 14) provides for fines ranging from $250 to $5,000.

4. Multiple Offences

See *Imperial Oil* v. *R.* (1990), 5 C.E.L.R. (N.S.) 81 (Ont. C.A.) where the Court held that a person should not be liable to conviction of more than one offence arising out of one discharge.

5. Subsequent Convictions

In Nova Scotia there is no definition of any "subsequent offence". Difficulty may be encountered in characterizing an offence as subsequent to an earlier conviction. Cf. s. 146(b) of the Ontario *Environmental Protection Act* and *Negridge* v. *The Queen* (1980), 17 C.R. (3d) 14 (Ont. C.A.).

6. Dangerous Goods - Hazardous Wastes

Offences involving dangerous goods and hazardous wastes have been given higher fines by the Courts. See Dianne Saxe, *Fines Go Up Dramatically in Environmental Cases*, (1989) 3 C.E.L.R. (N.S.) 104.

7. Various Persons Charges

The Crown in recent years has charged not only the corporation, but the directors and employees as well. See *R.* v. *Bata Industries Limited*, *supra*, where the company was fined $120,000 and two directors $12,000 each. The Court held that when sentencing a director, the following issues need to be reviewed:

(a) Sentencing in a "first case". This is a mitigating factor in sentencing. The accused argued this was the first case were the courts imposed environmental guidelines which directors are expected to meet.

(b) Indemnification of directors by corporation. The Court held the corporation was not to indemnify the directors.

(c) Parity. The on-site director and off-site director were treated equally.

(d) Remorse. This is more significant for individuals than corporations. Here the directors did not attend the sentencing hearing and the Court noted this.

Nova Scotia legislation does not provide for imprisonment except in default of paying a fine.

8. Uniformity of Fines

The Courts have sometimes attempted to impose some uniformity in fines for environmental offences. *R.* v. *Oxford Frozen Foods Limited* (1989), 91 N.S.R. (2d) 334 (N.S. Co. Ct.). This factor was considered to lower the fine under the *Fisheries Act* from $6,000 to $4,000.

The Provincial Court in New Brunswick appears to have taken the approach that it will not be bound by low fines imposed in the past. In *R.* v. *New Brunswick Electric Power Commission*, *supra*, the Court imposed a fine of $20,000. Judge Stymiest held he would not be bound by low fines which he himself had given out in the past. See also *R.* v. *Brunswick Mining and Smelting Corporation Limited*, New Brunswick Prov. Ct., July 8, 1991, (unreported) where the Court imposed a fine of $30,000 where there was no actual fish killed. The potential for there to be a fish kill was the primary consideration by the Court.

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13. *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 2 Q.B. 299,]1968] 1 All E.R. 229, [1968] 2 W.L.R. 201 (C.A.).

14. *Construction Montcalm Inc.* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754.

15. *Corkum* v. *Lohnes* (1981), 43 N.S.R. (2d) 477, 81 A.P.R. 477, 121 D.L.R. (3d) 761 (N.S.S.C.A.D.).

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28. *Manitoba (A.G.)* v. *Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 73 N.R. 341, 38 D.L.R. (4th) 432, [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, 18 C.P.C. (2d) 273, 25 Admin. L.R. 20, (*sub nom. Metropolitan Stores (MTS) Ltd.* v. *Manitoba Food & Commercial Workers, Local 832)*, *(1987)*, 87 C.L.L.C. 14, 015 (S.C.C.).

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35. *Ontario (Minister of Environment)* v. *Exolon Co. of Canada* (1981) 36 O.R. (2d) 530 (Ont. Prov. Ct.).

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38. *R.* v. *Atlantic Golf Construction Limited*, 1991 (unreported).

39. *R. v. Autoport Limited*, Nova Scotia Provincial Court, January 1992 (unreported).

40. *R. v. Bata Industries Limited*, Ontario Court of Justice, Provincial Division, February 7, 1992, Ormston J. (unreported).

41. *R. v. Bata Industries, Ontario Court of Justice*, Provincial Division, March 30, 1992, Ormston J. (unreported).

42. *R. v. Belter* (1990), 10 W.C.B. (2d) 195 (B.C. Co. Ct.).

43. *R. v. B.E.S.T. Plating Shoppe Ltd.* (1986), 1 C.E.L.R. (N.S.) 145, 59 O.R. (2d) 145, 32 C.C.C. (3d) 417, 19 C.P.C. (2d) 174, 21 O.A.C. 62 (Ont. C.A.), reversing in part (1986), 1 C.E.L.R. (N.S.) 85 (Ont. H.C.).

44. *R. v. Boise Cascade Canada Ltd.*, Ontario Provincial Court, February 11, 1980 (unreported).

45. *R. v. Brunswick Mining and Smelting Corporation*, New Brunswick Provincial Court, July 8, 1991 (unreported).

46. *R. v. Canadian Forest Products Ltd.* (1978), 7 C.E.L.R. 113 (B.C. Prov. Ct.)

47. *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.).

48. *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295, 11 C.C.E.L. 219, 14 O.A.C. 225, 52 C.R. (3d) 188 (Ont. C.A.).

49. *R. v. Charlottenburg (Township)*, Ontario Provincial Court, August 7, 1976, Levisk J. (unreported).

50. *R. v. Cotton Felts Ltd.* (1982), C.E.S.H.G. 95, 056, 2 C.C.C. (3d) 287 (Ont. C.A.).

51. *R. v. Crossley Karastan Carpet Mills Limited* (1982), 3 F.P.R. 253 (N.S. Prov. Ct.).

52. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 84 N.R. 1, [1988] 3 W.W.R. 385, 3 C.E.L.R. (N.S.) 1, 25 B.C.L.R. (2d) 145, 40 C.C.C. (2d) 289, 48 D.L.R. (4th) 161 (S.C.C.).

53. *R. v. D & L Metals Limited*, July 8, 1991, Ontario Provincial Court (unreported).

54. *R. v. Denton* (1991), 105 N.S.R. (2d) 357 (N.S.S.C.A.D.).

55. *R. v. D'Entremont* (1931), 4 M.P.R. 142, 57 C.C.C. 174, [1932] 2 D.L.R. 236 (N.S.S.C.A.D.).

56. *R. v. D.M.H.*, Nova Scotia Supreme Court, Appeal Division, October 10, 1991 (unreported) (S.C.C. 02451).

57. *R. v. Echo Bay Mines Ltd.* (1980), 12 C.E.L.R. 38 (N.W.T. Terr. Ct.).

58. *R. v. Ellis-Don Ltd.*, Supreme Court of Canada, March 31, 1992, Lamer C.J., LaForest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ. (unreported) (22297).

59. *R. v. Enheat* (1985), 4 F.P.R. 205 (N.S. Prov. Ct.).

60. *R. v. Fabricated Plastics Ltd.* (1979), 8 C.E.L.R. 174 (Ont. Prov. Ct.).

61. *R. v. Francis* [1988] 1 S.C.R. 1025, 85 N.R. 3, 51 D.L.R. (4th) 418, 5 M.V.T. (2d) 268, 85 N.B.R. (2d) 243, 41 C.C.C. (3d) 217 (S.C.C.).

62. *R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Y.T. Terr. Ct.).*

63. *R. v. Gordon's Greenhouse Limited, Nova Scotia Provincial Court, June 12, 1991, Crawford J. (unreported).*

64. *R. v. Gulf Canada Corp., [1987] N.W.T.R. 277, 2 C.E.L.R. (N.S.) 261 (N.W.T. Terr. Ct.).*

65. *R. v. Gulf of Georgia Towing Co., [1979] 3 W.W.R. 84, 10 B.C.L.R. 134 (B.C.C.A.).*

66. *R. v. Hall's Refrigeration Ltd. (1987), 4 F.P.R. 247 (Nfld. Prov. Ct.).*

67. *R. v. Industrial Roofing and Siding Ltd., Ontario Provincial Offences Court, February 5, 1990 (unreported).*

68. *R. v. Inland Shake and Shingle Ltd. (1987), 3 W.C.B. (2d) 405 (B.C. Co. Ct.).*

69. *R. v. Irving Oil Co. (1981), 45 N.S.R. (2d) 438, 86 A.P.R. 438 (Co. Ct.).*

70. *R. v. Island Farm and Fish Meal, Prince Edward Island Supreme Court, Trial Division, May 1, 1991, Matheson J. (unreported).*

71. R. v. Jackson Brothers Logging Co. *[1984] 4 W.W.R. 563, 3 D.P.R. 469, 14 C.C.C. (3d) 1 (B.C. Co. Ct.).*

72. R. v. Joi-Terra Farms Ltd. *(1987), 79 N.S.R. (2d) 203, 196 A.P.R. 203 (N.S.Co.Ct.).*

73. R. v. Kenaston Drilling (Arctic) Ltd. *(1973) 12 C.C.C. (2d) 383, 41 D.L.R. (3d) 252 (N.W.T.S.C.).*

74. R. v. Kent *(1991), 102 N.S.R. (2d) 181, 279 A.P.R. 181 (N.S. Co. Ct.); affirmed Nova Scotia Supreme Court, Appeal Division, October 17, 1991 (unreported) (S.C.C. 02463).*

75. R. v. Lake Ontario Cement Ltd. [1973] 2 O.R. 247, 11 C.C.C. (2d) 1, 35 D.L.R. (3d) 109.

76. R. v. Longmire *(1988), 83 N.S.R. (2d) 266, 210 A.P.R. 266 (N.S. Co. Ct.).*

77. R. v. MacDougall, *[1982] 2 S.C.R. 605, 18 M.V.R. 180, 31 C.R. (3d) 1, 1 C.C.C. (3d) 65, 54 N.S.R. (2d) 562, 112 A.P.R. 562, 142 D.L.R. (3d) 216, 44 N.R. 560 (S.C.C.).*

78. R. v. MacMillan Bloedel Industries Ltd. *(1973), 13 C.C.C. (2d) 459, 41 D.L.R. (3d) 247 (B.C. Prov. Ct.).*

79. R. v. MacMillan Bloedel Ltd. (1983), 3 F.P.R. 335 (B.C. Prov. Ct.).

80. R. v. MacPherson (1977), 24 N.S.R. (2d) 102 (S.C.A.D.).

81. R. v. *Mac's Convenience Stores Inc.* (1985), 14 C.E.L.R. 120 (Ont. Prov. Ct.)

82. R. v. *Mechanical Engineering Limited*, Nova Scotia Provincial Court, May 7, 1991, Oxner J. (unreported).

83. R. v. *Metropolitan Stores (MTS) Ltd. (1987), 66 Nfld. & P.E.I.R. 241, 204 A.P.R. 241 (P.E.I. Prov. Ct.)*

84. R. v. Midland Transport Limited, *Nova Scotia Provincial Court, February 28, 1992 (unreported).*

85. R. v. Milaster *(1983), 3 F.P.R. 403 (B.C. Prov. Ct.).*

86. R. v. Miles of Mustic Ltd. *(1989) 48 C.C.C. (3d) 96, 31 O.A.C. 380, 69 C.R. (3d) 361, 24 C.P.R. (3d) 301, 74 O.R. (2d) 518 (Ont. C.A.).*

87. R. v. New Brunswick Electric Power Commission, *New Brunswick Provincial Court, July 8, 1991 (unreported)*.

88. R. v. Nicholl *(1971), 14 Cr. L.Q. 102 (N.S. Co. Ct.)*.

89. R. v. North Canadian Enterprises Ltd. *(1974), 20 C.C.C. (2d) 242 (Ont. Prov. Ct.)*.

90. R. v. North Vancouver (District) *(1982), 11 C.E.L.R. 158, 3 F.P.R. 233 (B.C. Prov. Ct.) affirmed (1983), 12 C.E.L.R. 67, 3 F.P.R. 249 (B.C. Co. Ct.) affirmed (1984), 13 C.E.L.R. 60, 3 F.P.R. 491 (B.C.C.A.)*.

91. R. v. Northern Pigments Ltd., *Ontario Provincial Offences Court, May 29, 1991 (unreported)*.

92. R. v. Northwest Territories Power Corp. *(1989), 5 C.E.L.R. (N.S.) 57, [1990] N.W.T.R. 115 (N.W.T. Terr. Ct.), reversed in part by (1990), 5 C.E.L.R. (N.S.) 67, [1990] N.W.T.R. 125 (N.W.T.S.C.)*.

93. R. v. Oakes *[1986] 1 S.C.R. 103, 53 O.R. (2d) 719, 50 C.R. (3d) 1, 14 O.A.C. 335, 19 C.R.R. 308, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 65 N.R. 87 (S.C.C.)*.

94. R. v. Omstead Foods Limited, August 6, 1991, Ontario Provincial Court (unreported).

95. *R. v. Ontario Hydro*, Ontario Provincial Court, November 26, 1986 (unreported).

96. *R. v. Oxford Frozen Foods Ltd.* (1989) 91 N.S.R. (2d) 334, 233 A.P.R. 334, 5 C.E.L.R. (N.S.) 37 (N.S. Co. Ct.).

97. *R. v. Oxford Frozen Foods Limited*, Nova Scotia Provincial Court, Cole J. (unreported).

98. *R. v. Panarctic Oils Ltd.* (1982) 12 C.E.L.R. 29, [1983] N.W.T.R. 47, 44 A.R. 385, 3 F.P.R. 420 (N.W.T. Terr. Ct.), additional reasons at [1983] N.W.T.R. 143, 43 A.R. 199, 12 C.E.L.R. 78, 3 F.P.R. 429 (N.W.T. Terr. Ct.).

99. *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 D.L.R. (3d) 591, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193 (S.C.C.).

100. *R. v. Placer Developments Ltd.* (1983) 13 C.E.L.R. 42 (Y.T. Terr. Ct.).

101. *R. v. Placer Development Limited* (1985), 4 F.P.R. 366 (Y.T. Terr. Ct.).

102. *R. v. Primo Foods Inc.*, June 25, 1987, Ontario Provincial Offences Court (unreported).

103. *R. v. Penz* (1972), 10 C.C.C. (2d) 250 (Ont. C.A.).

104. *R. v. Rice* [1963] 1 C.C.C. 108 (Ont. Co. Ct.)

105. *R. v. Rio Algom Ltd.* (1988), 23 C.C.E.L. 85, 29 O.A.C. 349, 3 C.E.L.R. (N.S.) 171, 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 (Ont. C.A.).

106. R. v. Safety-Kleen Canada Inc., *Ontario Court of Justice, General Division, October 7, 1991, Salhany J. (unreported) (3120/91).*

107. R. v. St. Lawrence Fluorspar Limited *(1989), 80 Nfld. & P.E.I.R. 171 (Nfld. Prov. Ct.).*

108. R. v. *St. Michael's Hospital* (1987), 2 C.E.L.R. (N.S.) 327 (Ont. Dist. Ct.).

109. *R. v. Satellite Construction Limited*, Nova Scotia Provincial Court, April 2, 1992 (unreported).

110. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161 (S.C.C.).

111. *R. v. Scott Maritimes Limited*, Nova Scotia Provincial Court, 1988 (unreported).

112. *R. v. Scott Maritimes Limited*, Nova Scotia Provincial Court, 1988 (unreported).

113. *R. v. Seafreez Foods Inc.*, Nova Scotia Provincial Court, January 29, 1992 (unreported).

114. *R. v. Shamrock Chemicals Ltd.* (1989), 4 C.E.L.R. (N.S.) 315 (Ont. Dist. Ct.).

115. *R. v. Shea* (1982), 38 O.R. (2d) 582, 2 C.R.R. 1, 1 C.C.C. (3d) 316, 142 D.L.R. (3d) 419 (Ont. H.C.).

116. *R. v. Spataro Cheese Products Ltd.* (1981), 10 C.E.L.R. 128 (Ont. Prov. Offences Ct.).

117. *R. v. Steinberg's Ltd.* (1977), 17 O.R. (2d) 559, 37 C.C.C. (2d) 417, 34 C.P.R. (2d) 60, 80 D.L.R. (3d) 741 (Ont. Prov. Ct.).

118. *R. v. Surette Battery Company*, Nova Scotia Provincial Court, 1988 (unreported).

119. *R. v. TNT Canada Inc.* (1986), 18 O.A.C. 133, 58 O.R. (2d) 410, 32 C.C.C. (3d) 140, 37 D.L.R. (4th) 297, (*sub nom. TNT Canada v. Ontario*), 1 C.E.L.R. (N.S.) 109 (Ont. C.A.).

120. *R. v. Toronto Electric Commissioners* (1991), 6 C.E.L.R. (N.S.) 301 (Ont. Gen. Div.).

121. *R. v. Tuck*, British Columbia Provincial Court, May 27, 1991 (unreported).

122. *R. v. Union Carbide Canada Ltd.*, Ontario Provincial Court, August 17, 1990, Morrison J. (unreported).

123. *R. v. United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. (Y.T. Terr. Ct.).

124. *R. v. Vandervoet* (1986), 26 C.R.R. 173 (Ont. Prov. Ct.).

125. *R. v. Weil's Food Processing Limited* (1992), 6 C.E.L.R. (N.S.) 249 (Ont. Div. Ct.).

126. *R. v. West Pubnico Golf and Country Club Limited*, 1991 (unreported).

127. *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.).

128. *R. v. York Sanitation Co. Ltd. (1978), 8 C.E.L.R. 146 (Ont. Prov. Ct.).*

129. *R. v. Zalev Brothers Ltd.*, Ontario District Court, September 22, 1989 (unreported).

130. *Re Ownership of Bed of Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388.

131. *Roy v. Ecole d'Escalade la Haute Perchee Inc.*, [1888] R.J.Q. 663 (Que. C.A.) leave to appeal to S.C.C. refused [1988] 1 S.C.R. viii.

132. *Sable Fish Packers (1988) Limited* v. *R.*, Nova Scotia County Court, May 30, 1991, Haliburton J. (unreported) (1990) C.F.B. No. 3063).

133. *St.-Denis de Brompton (Municipality)* v. Filteau (1986), 59 D.L.R. (4th) 84 33 M.P.L.R. 125, [1986] R.J.Q. 2400, 9 Q.A.C. 1 (Que. C.A.).

134. *Sweet* v. *Parsley* [1970) A.C. 132, [1969] 2 W.L.R. 170 (H.L.).

135. *Thompson Newspapers Ltd.* v. *Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425, 106 N.R. 161, 67 D.L.R. (4th) 161, 76 C.R. (3d) 129, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 39 O.A.C. 161, 47 C.R.R. 1.

136. *Tidewater Construction Co.* v. *Nova Scotia (Minister of Environment)* (No. 1) (1986), 77 N.S.R. (2d) 368, 191 A.P.R. 368 (N.S.S.C.A.D.).

137. *Tidewater Construction Co.* v. *Nova Scotia (Minister of Environment)* (No. 2) (1987), 77 N.S.R. (2d) 372, 191 A.P.R. 372, (*sub nom Nova Scotia (Minister of Environment)* v. *Cacchione*) (1987), 1 C.E.L.R. (N.S.) 177, 35 D.L.R. (4th) 196 (N.S.S.C.T.C.).

138. *U.S.* v. Park, *421 U.S. 658 (1975)*

139. *Windermere Watersport Inc.* v. *Invermere (District)* (1989), 59 D.L.R. (4th) 285, 44 M.P.L.R. 78, 37 B.C.L.R. (2d) 112 (B.C.C.A.).

LEGISLATION ADMINISTERED BY THE DEPARTMENT OF THE ENVIRONMENT

NOVA SCOTIA
ACTS INDEX

1. **Clean Nova Scotia Foundation Act**, R.S.N.S. 1989, c.72
   Proclaimed: June 28, 1988 (OIC 88-690)
   In Force: July 1, 1988

2. **Dangerous Goods and Hazardous-wastes Management Act**, R.S.N.S. 1989, c.118, as amended by S.N.S. 1990, c.27
   Proclaimed: July 8, 1986
   In Force: July 15, 1986

3. **Derelict Vehicles Removal Act**, R.S.N.S. 1989, c.128
   Proclaimed: June 28, 1988 (OIC 88-689)
   In Force: July 1, 1988

4. **Environmental Assessment Act**, R.S.N.S. 1989, c.149
   Proclaimed: June 27, 1989 (OIC 89-746)
   In Force: July 14, 1989

5. **Environmental Protection Act**, R.S.N.S. 1989, c.150

6. **Environmental Trust Act**, S.N.S. 1990, c.9
   In Force: June 19th, 1990

7. **Litter Abatement Act**, S.N.S. 1989, c.8
   Proclaimed: February 20, 1990 (OIC 90-198)
   In Force: March 1, 1990

8. **Ozone Layer Protection Act**, R.S.N.S. 1989, c.331
   In Effect: June 15, 1989

9. **Pest Control Products (Nova Scotia) Act**, R.S.N.S. 1989, c.341
   Proclaimed: July 8, 1986 (OIC 86-809)
   In Force: July 15, 1986

10. **Recycling Act**, S.N.S. 1989, c.12
    Proclaimed: February 20, 1990 (OIC 90-199)
    In Force: March 1, 1990

11. **Water Act**, R.S.N.S. 1989, c.500

12. **Well Drilling Act**, R.S.N.S. 1989, c.502

13. **Youth Conservation Corps Act**, R.S.N.S. 1989, c.510
Proclaimed: July 18, 1989 (OIC 89-818)
In Force: July 18, 1989

14. **Emergency Measures Act**, S.N.S. 1990, c.8
Proclaimed: July 31, 1990 (OIC 90-931)
In Force: November 1, 1990

OTHER PROVINCIAL LEGISLATION

1. **Dangerous Goods Transportation Act**, R.S.N.S. 1989, c.119
(Administered by Department of Transportation and Communications)

   (a) Dangerous Goods Transportation Regulations
   O.I.C. 85-1013 (September 17, 1985)
   Effective: November 1, 1985

2. **Health Act**, R.S.N.S. 1989, c.195
(Administered by Department of Health and Fitness)

   (a) Lands to be Serviced by On-Site Sewage Disposal Regulations
   O.I.C. 82-719

3. **Salvage Yards Licensing Act**, R.S.N.S. 1989, c.410
(Administered by the Board of Commissioners of Public Utilities of Nova Scotia)

   (a) Salvage Yards Licensing Regulations
   O.I.C. 71-39 (April 27, 1971)
   As amended by O.I.C. 82-581

4. **Motor Vehicle Act**, R.S.N.S. 1989, c.293
(Administered by the Departmnet of Transportation and Communications)

   (a) Standards of Vehicle Equipment Regulations
   O.I.C. 85-216
   Effective: June 1, 1991
   Section 12 as amended by O.I.C. 91-293 (March 12, 1991) to provide for pollution control equipment on vehicles produced in 1991 and later.

DEPARTMENT OF ENVIRONMENT

REGULATIONS INDEX

1. **Clean Nova Scotia Foundation Act** - NIL

2. **Dangerous Goods and Hazardous-wastes Management Act**

   (a) Asbestos Waste Regulations 90-866 (July 17, 1990)
   Effective: August 1, 1990

   (b) Dangerous Goods Storage Regulations 89-768 (July 5, 1989)

   Amendment No. 1: 89-802 (July 11, 1989)
   Effective: July 17, 1989

   (c) PCB Storage Regulations 88-1233 (November 8, 1988)
   **to be replaced
   Effective: November 15, 1988

   (d) Petroleum Storage Regulations 88-163 (February 16, 1988)

   Amendment No. 1: 88-867 (August 3, 1988)
   Effective: February 16, 1988

   Amendment No. 2: 91-594 (May 14, 1991)
   Effective: June 1, 1991

   (e) Waste Oil Regulations 90-867 (July 17, 1990)
   Effective: August 1, 1990

3. **Derelict Vehicles Removal Act**

   (a) Derelict Vehicles Removal Regulations
   90-314 (March 13, 1990)
   Effective: April 1, 1990

4. **Environmental Assessment Act**

   (a) Environment Assessment Regulations
   89-747 (June 27, 1989)
   Effective: July 14, 1989

   Amendment No. 1: 90-1003 (August 21, 1990)
   Effective: August 21, 1990

   Amendment No. 2: 91-595 (May 14, 1991)
   Effective: June 1, 1991

   Amendment No. 3: 91-996 (August 29, 1991)
   Effective: September 15, 1991

(b) Environmental Assessment Hearing Regulations
90-1357 (November 20, 1990)
Effective: December 1, 1990

5. **Environmental Protection Act**

(a) Public Hearing Regulations - Environmental Control Council/Executive Committee
74-824 (July 30, 1974)

(b) Regional Municipal Solid Waste Management Financial Assistance Regulations
90-1326 (November 13, 1990)
Effective: January 1, 1991

Amendment No. 1: 91-665 (June 4th, 1991)
Effective: June 15, 1991

(c) Water Quality Standards (Suspension or Cancellation of Permits) Regulations
86-471A (May 1, 1986)

(d) General (Suspension or Cancellation of Permit) Regulations
86-974A (August 6, 1986)

(e) Herring Waste Burial Regulations
88-1011 (September 20, 1988)

(f) Biomedical Waste Incinerator Regulations
88-1406 (December 20, 1988)
Effective: December 7, 1988

(g) Delegation of Authority Regulations - Environmental Protection Act
89-1105 (September 26, 1989)
Effective: October 1, 1989

(h) Municipal Waste Incinerator Regulations
90-242 (February 27, 1990)
Effective: March 1, 1990

(i) Gasoline Volatility Regulations
90-527 (April 26, 1990)
Effective: May 1, 1990
Application Dates:
July 1, 1990 to September 15, 1990
May 15, 1991 to September 15, 1991
(these same dates each year thereafter)

(j) Waste Disposal Site Regulations
91-523 (April 30, 1991)
Effective: May 1, 1991
Grandfather clause to May 1, 1992

(k) Water and Wastewater Facility Classification Regulations
92-60
Effective: January 21, 1992

6. **Environmental Trust Act**

(a) Nova Scotia Environmental Trust Regulations
90-1325 (November 13, 1990)
Effective: January 1, 1991

7. **Litter Abatement Act**

(a) General Litter Abatement Regulations
90-819 (July 3, 1990)
Effective: August 1, 1990

(b) Beverage Container Regulations
90-1076 (September 4, 1990)
Effective: September 15, 1990

8. **Ozone Layer Protection Regulations**

(a) Ozone Layer Protection Regulations
91-41 (January 15, 1991)
Effective: February 15, 1991

9. **Pest Control Products (Nova Scotia) Act**

(a) Pest Control Products Licence and Permit Regulations
89-674 (June 13, 1989)
Effective: July 1, 1989

Amendment No. 1: 90-951 (May 15, 1990)
Effective: May 15, 1990

Amendment No. 2: 90-1004 (August 21, 1990)
Effective: August 21, 1990

Amendment No. 3: 91-266 (March 5, 1991)
Effective: March 15, 1991

Amendment No. 4: 91-310 (March 12, 1991)
Effective: March 22, 1991

Amendment No. 5: 91-345 (March 26, 1991)
Effective: March 31, 1991

(b) Pesticide Storage Regulations
91-40 (January 15, 1991)
Effective: February 15, 1991

Amendment No. 1: 91-267 (March 5, 1991)
Effective: March 15, 1991

10. **Recycling Act**

(a) Resource Recovery Fund Regulations
90-943 (July 31, 1990)
Effective: September 15, 1990

Amendment No. 1: 90-1075 (September 4, 1990)
Effective: September 15, 1990

Amendment No. 2: 91-1237 (October 22, 1991)
Effective: November 1, 1991

11. **Water Act**

(a) Municipal Sewage Works Financial Assistance Regulations - Section 14
90-868 (July 17, 1990)
Effective: August 1, 1990

(b) Delegation of Authority Regulations - Water Act

(i) 89-1106 (September 6, 1989)
Effective: October 1, 1989

(ii) Amendment No. 1: 89-1196 (October 19, 1989)

(c) Water Licence and Permit Regulations
90-313 (March 13, 1990)
Effective: April 15, 1990

12. **Well Drilling Act**

(a) Well Drilling Regulations
85-1221 (November 5, 1985)
Effective: November 1, 1985

13. Youth Conservation Corps - NIL

14. **Emergency Measures Act**

(a) State of Emergency Regulations
92-61 (January 21, 1992)
Effective February 1, 1992

DEPARTMENT OF THE ENVIRONMENT

POLICIES/GUIDELINES/STANDARDS

A. Watercourse Policies/Guidelines/Standards

1. Environmental Construction Practice Specifications (September 1981 - revised 1991);
2. Erosion and Sedimentation Control Handbook for Construction Sites (1988);
3. Environmental Standards for the Construction of Forest Roads and Fire Ponds in Nova Scotia (April 1983 - being revised);
4. Policy Guidelines on Watercourse Alterations (May 16, 1977);
5. Standards for Construction of Agricultural Drainage Ditches (1988 - being revised);
6. Application for Permanent Structures/Activities on Inland/Coastal Waters (June, 1991. Implemented in association with the Department of Natural Resources);
7. Guidelines for Designation of Protected Water Areas (1991 - in print);
8. Designing Water Supply Watershed Management Strategies in Nova Scotia (1992 - in print);
9. Guidelines for a Stationary Type Screen at Water Intakes to Prevent Losses of Juvenile Salmon and Trout (June, 1988);
10. Guidelines for Stream Clearance Blockage Work (1988);
11. Guidelines for Ponds of By-Pass Variety (1988);
12. Environmental Considerations for Development Proposals (being prepared);
13. Environmental Guidelines for Water Haulers (1989);
14. Farm Ponds (1984);
15. Dam Construction Environmental Guidelines (Fisheries and Oceans, January 1987);

B. Air Quality Policies/Guidelines/Standards

16. Policy on Burning of Buildings (February 17, 1989);

17. Policy on Open Burning of Tires or Wire (April 19, 1990 - being considered for regulations);

18. Guidelines for the Application and Removal of Protective Coatings During Bridge Maintenance Operation (March 15, 1990 - being revised);

19. Guidelines for Handling and Disposal of Biomedical Wastes from Nova Scotia Health Care Facilities and Laboratories (March, 1988);

20. Guidelines for the Design and Operation of Biomedical Incinerators in Nova Scotia (1989);

21. Guidelines for the Operation of Small Waste Oil Furnaces (August 9, 1991 - being considered for regulations);

22. Guidelines for Environmental Noise Measurement and Assessment (April, 1990);

23. Air Emission Objectives for Sulphate Process Mills (mid 1970's);

24. Air Emission Objectives for Sulphite Process Mills (mid 1970's);

25. Operating and Emission Guidelines for Municipal Solid Waste Incinerators - C.C.M.E. Document (June, 1989);

26. Current Air Quality Objectives (August 12, 1991).

C. Dangerous Goods/Hazardous Wastes Policies/Guidelines/Standards

27. Nova Scotia Hazardous Waste Policy (February, 1991);

28. Nova Scotia Non-Hazardous Waste Policy (February, 1991);

29. Petroleum Storage Guidelines for Transportation and Disposal of Underground Tanks (April 12, 1990);

30. Petroleum Storage Guidelines for the Construction of Petroleum Storage Tanks Disposal Facilities (April 12, 1990);

31. Construction and Installation Standards for Petroleum Storage Systems (July 1991);

32. Guidelines for Soil Remediation for Contamination from Petroleum Products (July, 1990);

33. Contingency Plan Guidelines for Releases of Dangerous Goods and Hazardous-wastes (March 26, 1990);

34. Guidelines for the Disposal of Oily Soil (April, 1990);

35. Guidelines for Site Sensitivity for Petroleum Storage Installations (1989);

36. Waste Oil Dilution Guidelines (August 9, 1991).

D. Industry Policies/Guidelines/Standards

37. Pit and Quarry Guidelines (May 1, 1988 - being revised);

38. Guidelines for Development of Slates in Nova Scotia (February 1990 - draft regulations prepared);

39. Environmental Guidelines for Surface Mining Operations (October 1, 1985);

40. Guidelines for Disposal of Dredge Spoils on Land (1987);

41. Asphalt Paving Plant Guidelines (1981 - being revised);

42. Emission Guidelines for Bilge Water (April 5, 1991).

E. Pesticide Policies/Guidelines/Standards

43. Guidelines for Disposal of Pesticides and Containers (1989);

44. Storage of Pesticide Guidelines (April 16, 1991);

45. Pesticide Licensing Exam Guidelines (October 1, 1991).

46. Sign Posting Guidelines for Landscape Companies (May 22, 1990).

F. Litter/Recycling Policy/Guidelines/Standards

47. Beverage Container Guidelines (October 30, 1991).

G. **Municipal Waste Policies/Guidelines/Standards**

48. Municipal Solid Waste Landfill Manual (Draft);

49. Nova Scotia Standards and Guidelines Manual for the Collection, Treatment and Disposal of Sanitary Sewage (Draft);

50. Composting Guidelines (December 1991);

51. Guidelines for the Management and Use of Animal Manure in Nova Scotia (1991).

DELEGATION OF AUTHORITY

INDEX

1.	Inspectors	July 5, 1991
2.	Asbestos Waste Regulations (Directors)	January 7, 1990
3.	Dangerous Goods Storage Regulations (Directors)	January 7, 1991
4.	PCB Storage Regulations (Directors)	January 7, 1991
5.	Waste Oil Regulations (Directors)	January 2, 1991
6.	Derelict Vehicles Removal Regulations (Directors)	July 10, 1991
7.	Regional Municipal Solid Waste Financial Assistance Regulations (Officers)	December 4, 1990
8.	Municipal Waste Incinerator Regulations (Managers)	January 9, 1991
9.	Waste Disposal Site Regulations (Administrators)	May 28, 1991
10.	Section 45 Certificates	December 11, 1991
11.	Delegation of Authority Regulations (Stop Orders)	October 16, 1989
12.	Environmental Assessment Act (Administrators)	July 19, 1989
13.	Nova Scotia Environmental Trust Regulations (Administrators)	December 19, 1990
14.	Nova Scotia Environmental Trust Regulations (Administrators)	December 10, 1991
15.	General Litter Abatement Regulations (Administrators)	June 13, 1991
16.	Beverage Container Regulations (Administrators)	June 13, 1991
17.	Resource Recovery Fund Regulations (Administrators)	June 13, 1991

18.	Ozone Layer Protection Regulations (Administrators)	August 13, 1991
19.	Pest Control Products (Nova Scotia) Regulations (Supervisors)	May 8, 1991
20.	Municipal Sewage Works Financial Assistance Regulations (Officers)	October 24, 1990
21.	Water Licence and Permit Regulations (Officers)	January 14, 1991
22.	Well Drilling Act	March 20, 1990
23.	Delegation of Authority Regulations (Ministerial Orders, etc.)	October 5, 1989

TO WHOM IT MAY CONCERN
INSPECTOR APPOINTMENTS

I. I, John G. Leefe, Minister of the Department of the Environment, hereby appoint the following persons as "inspectors" as defined in Section 42 of Chapter 150 of the Revised Statutes of Nova Scotia 1989, the Environmental Protection Act, Section 24 of Chapter 341 of the Revised Statutes of Nova Scotia 1989, the Pest Control Products (Nova Scotia) Act, Section 8A of Chapter 118 of the Revised Statutes of Nova Scotia 1989, the Dangerous Goods and Hazardous-wastes Management Act, Section 19 of Chapter 500 of the Revised Statutes of Nova Scotia, 1989, the Water Act, and Section 9 of Chapter 502 of the Revised Statutes of Nova Scotia 1989, the Well Drilling Act:

1. Directors
2. Assistant Directors
3. Managers
4. Regional Managers
5. District Supervisors
6. Environmental Technologists
7. Environmental Analysts
8. Inspector (Specialist)
9. Engineers
10. Hydrogeologists
11. Chief Inspector (Well Drilling Act)
12. Chief (Investigations & Enforcement)
13. Special Constables

II. Inspectors appointed pursuant to Paragraph I are granted all powers to perform inspections under the following enactments, including all regulations made thereto:

1. Clean Nova Scotia Foundation Act, R.S.N.S. 1989, c.72.
2. Dangerous Goods and Hazardous-wastes Management Act, R.S.N.S. 1989, c.118, as amended by S.N.S. 1990, c.27.
3. Derelict Vehicles Removal Act, R.S.N.S. 1989, c.128.
4. Environmental Assessment Act, R.S.N.S. 1989, c.149.
5. Environmental Protection Act, R.S.N.S. 1989, c.150.
6. Environmental Trust Act, S.N.S. 1990, c.9.

7. Litter Abatement Act, S.N.S. 1989, c.8.
8. Ozone Layer Protection Act, R.S.N.S. 1989, c.331.
9. Pest Control Products (Nova Scotia) Act, R.S.N.S. 1989, c.341.
10. Recycling Act, S.N.S. 1989, c.12.
11. Water Act, R.S.N.S. 1989, c.500.
12. Well Drilling Act, R.S.N.S. 1989, c.502.
13. Youth Conservation Corps Act, R.S.N.S. 1989, c.510.
14. Any other environment legislation enacted from time to time which is administered by the Department of Environment.

III. Unless revoked or amended by the Minister, these appointments shall remain in effect while persons holding the above named job classifications are employed by the Department of the Environment.

DATED at Halifax, in the County of Halifax, Province of Nova Scotia, this 5th day of July, A.D., 1991.

John G. Leefe
Minister of the Environment

GOVERNMENT OF NOVA SCOTIA MANAGEMENT MANUALS

Manual 35 DEPARTMENT OF THE ENVIRONMENT

Chapter Law Enforcement

Page 1 Date June 14, 1991

1 Uniform Environmental Enforcement:

1.01 Legislative Authority:

Clean Nova Scotia Foundation Act
Dangerous Goods and Hazardous-wastes Management Act and Regulations
Derelict Vehicles Removal Act and Regulations
Environmental Assessment Act and Regulations
Environmental Protection Act and Regulations
Environmental Trust Act and Regulations
Litter Abatement Act and Regulations
Ozone Layer Protection Act and Regulations
Pest Control Products (N.S.) Act and Regulations
Recycling Act and Regulations
Water Act and Regulations
Well Drilling Act and Regulations
Youth Conservation Corps Act

1.02 Statement of Principles:

This policy describes the principles and procedures to be followed by the Nova Scotia Department of the Environment in order to deliver a uniform and equitable approach to enforcing its acts and regulations. The Department will use an appropriate and fair mix of legal remedies to ensure compliance with environmental law. The principles and procedures described below are to be applied to the public and private sectors uniformly.

1.03 Definitions:

MINISTERIAL ORDERS - A written regulatory instrument issued by the Minister of Environment or other authorized persons with directions and time limits set out relating to the procedures to be followed to limit, eliminate and/or control pollution or waste into the environment or to prevent contravention of enactments (including acts and/or regulations) or standards prescribed by the Minister. These Ministerial Orders are issued under the authority of the Environmental Protection Act, the Water Act and various other acts.

1 Uniform Environmental Enforcement:

1.03 Definitions:(Cont)

CONTROL DOCUMENTS - Any written instrument which carries statutory authority. This includes licences, permits, letters of authority, certificates of approval, requirements, directions and program approvals.

1.04 Contacts:

Director, Environmental Support Services Division
Department Solicitor, Department of Attorney General
Manager, Investigations and Enforcement Branch

1.05 Prosecution Principles:

The Nova Scotia Department of the Environment will follow established principles respecting prosecutions which include:

1 Prosecution will be the result of an informed judgement on the part of the investigator which includes the proper exercise of prosecutorial discretion;

2 Equal protection and benefit before and under the law will be respected;

3 Prosecution will be administered in an even-handed, non-discriminatory and fair manner which advances and protects the public interest at large;

4 Where there is sufficient evidence to provide all of the essential elements of the offence but the proper exercise of prosecutorial discretion dictates that no prosecution shall proceed, the reason for that decision shall be recorded in writing in the confidential investigative file;

5 The penalty requested by the Crown upon conviction will be commensurate with the seriousness of the offence and the circumstances of the offender in-

1 Uniform Environmental Enforcement:

1.05 Prosecution Principles: (Cont)

cluding the cooperation of the offender, past history and existing case law.

6 Decisions to prosecute minor offences via Summary Offence Tickets will be the decision of the investigator and based on the principles outlined above. Warnings may be issued where the investigator deems the same to be appropriate.

7 Offences of a more serious nature or that involve repeat offenders will involve staff from the Investigations and Enforcement Branch. The decision whether prosecution shall be pursued again will be based on sound judgement and principles and fair and equitable treatment under the law. These decisions will be reached after consultations with Crown Attorney(s) and the investigator(s). Such decisions shall not involve a decision of any personal matters, nor shall any Ministerial approval be required or requested.

8 Although not involving any Ministerial approval, prosecutorial action under paragraph (7) shall include notification to the Minister who shall be thoroughly briefed as to the circumstances surrounding the alleged offence.

1.06 Considerations in the Application of Prosecutorial Discretion:

For the purpose of paragraph 1.05, a proper exercise of the principles of prosecutorial discretion shall include consideration:

1 whether the violation poses a significant risk or adverse effect to human life, health, property and/or the environment;

1 Uniform Environmental Enforcement:

1.06 Considerations in the Application of Prosecutorial Discretion: (Cont)

2 whether pollution from the source is a serious obstacle to achievement of the environmental acts and regulations or environmental quality in general;

3 any unsatisfactory history of pollution control or negative attitude as indicated by the level of effort exercised to address and/or remedy the problem;

4 any unsatisfactory record of compliance with Departmental permits, licences, approvals, orders or directions;

5 whether the violation seems deliberate in nature or, if not deliberate, the degree of negligence or carelessness involved;

6 whether there has been concealment of information or any other obstructions;

7 whether the violation was repeated or a warning was disregarded;

8 whether prosecution is likely to have a deterrent effect on the sector generally or on others;

9 whether the credibility of the regulatory process with those regulated and the public requires prosecution;

10 whether the person has been previously charged and convicted on similar or related offences; or

11 whether failure to prosecute would tend to bring the law into disrepute.

1 Uniform Environmental Enforcement:

1.07 Ministerial Orders:

1 As a regulatory means to limit, eliminate and/or control pollution in the Province of Nova Scotia or to prevent contravention of an enactment or standards prescribed by the Minister, any Ministerial Order issued by the Minister of the Environment or other authorized person will be binding and enforced.

2 Care should be taken prior to the issuance of the Ministerial Order to ensure that the contents of the Ministerial Order are enforceable and supported by the legislation.

3 Refer to the Ministerial Order Check List in paragraph 1.08.

4 Ministerial Orders are valid and enforceable until rescinded by the Minister.

1.08 Ministerial Order Check List:

1 Issue Ministerial Order against landowner? Get deed, if possible.

2 Issue Ministerial Order against occupiers of land (tenants, garage operators, etc.)? Get proper names and addresses.

3 Issue Ministerial Order against other persons responsible (contractors, generator or waste carriers, etc.)? Get proper names and addresses.

4 Call Registry of Joint Stock Companies to get print out on any company involved (7770). Are the directors/officers to be named in the Order? Consider reasons why directors/officers should be named personally in the Ministerial Order.

1 Uniform Environmental Enforcement:

1.08 Ministerial Order Check List: (Cont)

5 If a lender has given money, has it foreclosed on the property and taken possession. The Department may consider naming the lender/receiver in the Ministerial Order.

6 Draft Schedule "A" outlining contents of Ministerial Order. State times frames.

7 What are the "reasonable and probable grounds" that pollution is or may take place or what standards prescribed are being breached? See preamble of Section 26 of the Environmental Protection Act. See preamble of Section 9 in the Water Act.

8 If the plant is to be shut down under S.26(1)(i) of the Environmental Protection Act outline what grounds exist that there is an "immediate" danger to human life, health of a person or property or likelihood of irreparable or irreversible damage to the environment.

9 Briefing Note to be prepared outlining facts leading up to the Ministerial Order. This will be given to Minister, Environmental Control Council and media division of the Environment.

10 Signature: The Minister and or Deputy Minister shall sign and date the Order after a proper briefing session. If an "officer" signs a Ministerial Order to shut down a plant, note the 24-hour reporting requirement to the Minister or Deputy Minister under the Delegation of Authority Regulations made pursuant to the Environmental Protection Act.

1 Uniform Environmental Enforcement:

1.08 Ministerial Order Check List: (Cont)

11 Service: All companies have a "recognized agent". This person can accept service of the Ministerial Order on behalf of the company. Section 49 of the Environmental Protection Act provides for service by mail if the Ministerial Order is not delivered personally (for example, out of Province).

12 Affidavit of Service: Staff who personally serve the Ministerial Order must complete an Affidavit of Service and return it to the solicitor.

13 Filing: Staff solicitor to refer Ministerial Order to Environmental Control Council and Registrar of Regulations for filing.

14 Amending/Varying Order: The Minister or Deputy Minister can amend, vary or revoke a Ministerial order issued. See Section 26(6) of the Environmental Protection Act for procedure.

15 Revoking Order: Once all terms and conditions are met, staff should request the Minister to file a revocation order.

1.09 Control Documents:

1 The Department will use control documents as a means to limit, eliminate and/or control pollution in the Province of Nova Scotia and to enforce and uphold enactments or standards prescribed by the Minister.

2 Any control document issued by the Minister or other authorized person will be binding and enforced.

1 Uniform Environmental Enforcement:

1.10 Preparation of Control Document/Check List:

Subject to the legislation and to other policies, control documents should be prepared such that they:

1 require intermediate steps to be completed in a timely and regular fashion;

2 require the installation of the pollution control equipment by the date specified;

3 require that pollution control equipment, once installed, is properly maintained and operated;

4 require that pollution control equipment be upgraded or modified as required to prevent occurrences;

5 specify the emission, discharge, and monitoring requirements or regulations that must be met;

6 include procedures to be followed during start-up, shutdown and repair, maintenance and decommissioning periods;

7 include compliance monitoring provisions and/or reporting provisions to the Department of the Environment;

8 include rehabilitation and/or remedial provisions upon abandonment or expiration of the control document; and

9 ensure such documents are reviewed regularly to confirm compliance based on regular inspection, testing and monitoring.

MINISTERIAL ORDERS

1984 - 1992 INDEX OF REGULATIONS
(Water Act and Environmental Protection Act)

1984

1.	227/84	Nova Construction Limited
2.	228/84	Reddy Group Limited
3.	241/84	Cleveland Lake (infilling of)
4.	258/84	River Lake (infilling of)
5.	262/84	Maritime Waste Oil Services Limited
6.	263/84	Dartmouth Salvage Limited
7.	265/84	National Sea Products Limited - Mink Cove
8.	279/84	Wedgeport Enterprises Limited

1985

1.	71/85	Waste Disposal Facility at Grand Etang
2.	151/85	John Cove Lobster Fisheries/John's Cove Fisheries Limited
3.	167/85	Sea Crest Fisheries Limited
4.	168/85	Comeau and Saulnier Limited
5.	169/85	Comeau and Saulnier Limited
6.	170/85	St. Mary's Bay Fisheries Limited - Revoked by 19/86
7.	176/85	Wendy's Reliable 1979 Limited
8.	183/85	I.M.P. Group Limited - Revoked by 20/86

1986

1.	19/86	St. Mary's Bay Fisheries - Revocation of 170/85
2.	20/86	I.M.P. Group Limited - Revocation of 183/85 New Stop Order issued.
3.	23/86	Maritime Waste Oil Services Limited - Revocation of Stop Order: (not filed with Registry) - New Stop Order issued.
4.	24/85	Legge, James Mr. and Mrs.
5.	43/86	Wendy's Reliable (1979) Limited
6.	58/86	Rio Algom Limited
7.	114/86	Maple Leaf Farm Supplies
8.	211/86	MacDonald, Allister (Lakeville, Antigonish County) Water Act Order
9.	212/86	Peters, Lambertus - Piggery
10.	222/86	Wedgeport Enterprises Limited
11.	225/86	MacDonald, Colin R.
12.	226/86	Scotia Marine Products 1983 Limited
13.	249/86	Silver, John E.
14.	299/86	New Minas Contracting Limited

1987

1.	12/87	MacKay, Donald Edward
2.	13/87	Wendy's Reliable 1979 Limited and Ronald Bell
3.	44/87	Maughan, Walter and Maughan Construction
4.	47/87	MacDonald, Allister
5.	91/87	Welton, Harry
6.	98/87	Nosco Marine Industry Inc.

7.	102/87	CSL Group Inc.
8.	118/87	Laurence Sweeney Fisheries Limited and L. Kent Sweeney
9.	119/87	Wile, Herbert
10.	130/87	Nosco Marine Industries Inc.
11.	131/87	Navican Management Inc.
12.	143/87	Francis, Arthur and Teresa
13.	144/87	MacKay, Donald Edward
14.	145/87	New Minas Contracting Limited
15.	146/87	Campbell, Dwight and McKinnley, Verne
16.	172/87	Vanmeekeren, Frank
17.	173/87	Maughan, Walter and Maughan Construction
18.	179/87	Ken Mor Realties Limited
19.	188/87	Arisaig Fisheries Limited
20.	189/87	MacKenzie, Archie
21.	212/87	Cape Breton Development Corporation
22.	214/87	Cape Breton Development Corporation - Amendment to 212/87
23.	231/87	Scott Weeks Limited and Zutphen Brothers
24.	232/87	Johnson, James
25.	253/87	Johnson, James

1988

1.	11/88	Saysf Developments Limited
2.	12/88	Crandell Developments Corporation Limited
3.	22/88	L. J. Casavechia Contracting Limited

4.	32/88	Twentieth Century Developments Limited Revoked by 13/89
5.	35/88	Twentieth Century Developments Limited Revoked by 13/89
6.	93/88	Saysf Developments Limited
7.	94/88	Point East Investments Limited Revoked by 112/88
8.	111/88	Montobello Developments Limited
9.	112/88	Point East Investments Limited Revocation of 94/88
10.	113/88	Econo Transmission Limited
11.	114/88	Sackville Radiator Services Limited
12.	147/88	Town of Berwick (Water Act Order)
13.	151/88	South Shore Sand and Gravel Limited
14.	160/88	Montobello Developments Limited
15.	194/88	Canchem Incorporated
16.	203/88	Scotia Protan Marine Canada Limited
17.	233/88	Irving Oil Limited

1989

1.	1/89	Cape Breton Development Corporation Revocation of 212/87
2.	13/89	Twentieth Century Developments Limited Revocation of 32/88
3.	16/89	Wendy's Reliable (1979) Limited and Ronald C. Bell
4.	54/89	Wendy's Reliable 91979) Limited and Ronald C. Bell Amendment to 16/89
5.	72/89	Baird's Septic Waste Disposal Revoked by 148/89

6.	77/89	Associated Electronics and Metal Salvage Limited and James D. Liswell - No. 1
7.	88/89	Oxford Frozen Foods Limited
8.	148/89	Baird's Septic Waste Disposal Revocation of 72/89
9.	158/89	Irving Oil Limited - Enfield Sewage Treatment Plant
10.	185/89	Associated Electronics and Metal Salvage Limited and James D. Liswell - No. 2
11.	186/89	Cape Breton Development Corporation
12.	195/89	Rothsay Rendering Division, a division of Maple Leaf Mills Limited
13.	216/89	The Village Commissioners of St. Peter's (Sewage Plant, St. Peter's, Richmond County)
14.	217/89	Carriage Oak Inn and Properties (Coldbrook, Kings County) Water Act Order
15.	242/89	Neptune Leather Canada Limited

Ministerial Orders
1990

1. **Irving Oil Limited** (January 23, 1990 - Regulation 19/90)
Revokes Ministerial Order issued on August 3, 1989, (Reg. 158/89) respecting the sewage treatment plan at Irving Truck Stop, located at Enfield, Halifax County.

2. **Wonderland Mobile Home Park Limited** (February 21, 1990 - Regulation 81/90)
Effluent to meet certain discharge levels at or before August 1, 1990 at the Company's property located at Cole Harbour, Halifax County.

3. **Village Commissioners of St. Peters** (February 23, 1990 - Regulation 86/90)
Hire consultant on or before March 31, 1990 to complete a pollution control study on or before September 30, 1990 re its plant located at St. Peters, Richmond County.

4. **Petro Canada Inc., Bill's Service Station Limited and John Siteman** (March 29th, 1990 - Regulation 109/90)
Study to be done on or before April 30, 1990, and remedial work to be done on or before May 15, 1990, re contamination of well located on property at Oyster Pond, Halifax County.

5. **Municipality of the County of Cumberland** (April 4, 1990 - Regulation 116/90)
Restrictions on Municipality's landfill operation located at Wallace, Cumberland County to be implemented and trench to be constructed on or before April 23, 1990.

6. **Seagull Pewter and Silversmiths Limited** (May 29th, 1990 - Regulation 147/90)
Immediately discontinue discharges of wastewater effluent into Pugwash Harbour, Cumberland County and removal of spent pewter dip solutions at the Company's facility at Bayhead, Colchester County on or before June 30, 1990.

7. **David Smith, James Robert Johnson and North East Logging** (August 23, 1990 - Regulation 239/90)
Restrictions and work to be done on or before September 15th, 1990, re a logging operation on lands located at Waughs River near Earlstown, Colchester County.

8. **Associated Electronics & Metal Salvage Limited, James D. Liswell and Ethel Liswell** (September 19, 1990 - Regulation 254/70)
Shut down Company's salvage yard operation at Five Island Lake, Halifax County and propose remedial plan on or before September 26, 1990.

9. **Mack D. Holmes, Bert Livingstone and Pictou County Excavators Limited** (September 26, 1990 - Regulation 262-90)
Immediately cease earthmoving activities into Stewart's Brook, Pictou County and perform short term and long term remedial measures to commence no later than October 15, 1990. Apply for permit on or before October 10, 1990.

10. **Wayne S. Rideout, Mary Piercey and Swansburg Construction Limited** (October 4, 1990 - Regulation 266/90)
Stop infilling in Sable River, Shelburne County and remove existing infill on or before November 12th, 1990.

11. **Russell G. Boutlier** (October 10, 1990 - Regulation 267/90)
Stop infilling in East Loon Lake, Halifax County and remove infilled material on or before November 5, 1990.

12. **Melville Ridge Holdings Limited, The Melville Place Limited, B.H. Fancy Construction Limited and Mahpal Developments Limited** (October 26, 1990 - Regulation 282/90)
Consultant to prepare engineer's plan on or before November 30, 1990, re deposit of pyritic slate on property located on Melville Ridge, Halifax County and unless permitted otherwise, remove the same on or before January 15, 1991.

13. **Municipality of County of Antigonish** (November 20, 1990 - Regulation 302/90)
Restrictions on operation of landfill at James River, Antigonish County. Water monitoring plan and closure plan to be developed on or before December 20, 1990. Site closure on or before June 30, 1991 unless permitted extensions.

14. **Curragh Resources Inc.** (November 20, 1990 - Regulation 303/90)
Hire consultant to prepare a soil erosion and sedimentation control plan on or before December 10, 1990 for Company's property located at Plymouth, Pictou County.

15. **LeVatte Construction Company Limited** (November 30, 1990 - Regulation 309/90)
Stop operations at clay burrow pit located at Blackett's Lake, Cape Breton County and perform remedial work on site on or before December 14, 1990.

MINISTERIAL ORDERS

1991

1. Metropolitan Authority (March 18, 1991 - Regulation 46/91). The Authority which operates the landfill site and treatment plant at Sackville, Halifax County, was ordered to address odour control (May 31), surface run off (July 30), leachate springs (July 30), litter problems (April 30) and high ammonia levels (August 30) by prescribed dates.

2. Amherst Aerospace Limited (March 28, 1991 - Regulation 53/91). Plant located at Amherst, Cumberland County. Inventory to be identified and labelled (June 14), plan for disposal of water (July 12), and waste management strategy to be developed (August 16).

3. Gordon's Greenhouses Limited and Gay Gordon (April 9, 1991 - Regulation 63/91). Plant located at Oxford, Cumberland County. Oil product to be contained); hire consultant (Immediate), site remediation (April 17), and disposal approval of contaminated products.

4. Westphal Mobile Home Court Limited (April 16, 1991 - Regulation 73/91). Trailer Park (Woodbine Mobile Home Park) located at Beaverbank, Halifax County. Sewage clean up (April 26), eliminate overflows (May 17); and improve effluent quality so BOD and suspended solids are less than or equal to 15 mg/l.

5. Nova Scotia Power Corporation: (May 9, 1991 - Regulation 104/91). Construction site at Point Aconi, Cape Breton County. Suspended solids not to exceed 25 m/l (immediate), 4 samples to be taken from sedimentation ponds and analysis to be submitted biweekly to D.O.E. (Sydney).

6. CBW Manufacturing Limited, CBW Distribution Limited, Cape Breton Wallcoverings and Ernst & Young Inc. (Receiver/Manager): (June 6, 1991 - Regulation 141/91). Plant at Northside Industrial Park, North Sydney, Cape Breton. Proper storage of hazardous wastes (June 28), low flash point repackaging (immediate), contamination identification (July 15) and progress reports (June 28).

7. Lawrence Hart/Florence Mae Hart (June 12, 1991 - Regulation 145/91). Infill at Lake Lewis, Lunenburg County. Remove infill (July 31).

8. Rothsay, a registered business name for Canada Packers Inc.: (June 19, 1991 - Regulation 149/91). Rendering plant located at Truro, Colchester County. Amends Schedule "A" attached to Ministerial Order issued in 1989 (Regulation 195/89). This Ministerial Order was amended on July 31, 1991 - Regulation 180/91. Canada Packers Inc. changed its name to Maple Leaf Foods Inc.

9. Cape Breton Development Corporation (DEVCO): (June 20, 1991 - Regulation 150/91). Order relates to coal operation at the International Pier Site, Whitney Pier, Cape Breton County. Amends Schedule "A" attached to a 1989 Ministerial Order (Regulation 186/89).

10. Seafreez Foods Incorporated: (August 23, 1991 - Regulation 187/91). Order relates to leaking of Freon R_{12} at Company's plant in Canso, Guysborough County. Unit to be replaced by October 11, 1991.

11. Anthony Rooyakkers/Henrika Rooyakkers: (September 27, 1991 - Regulation 212/91). Order relates to a drainage ditch problem at Princeville, Inverness County. Work to be completed on or before October 11, 1991.

12. Municipality of the County of Colchester (September 27, 1991 - Regulation 211/91). Order relates to Tatamagouche Dump, Colchester County. Work to be completed on or before October 11, 1991.

13. Sydney Steel Corporation (October 22, 1991) - Regulation 226/91). On or before November 30, 1991, Company ordered to prepare a report respecting the removal and/or relocation of stockpiled dolomite, coke and coke breeze located at or near the Company's lands.

14. Joseph Kelsie, Pearl Kelsie, Blair G. Walker and County Trucking Limited (December 18th, 1991). On or before January 15th, 1992, to have an Erosion and Sedimentation Control Plan and a Pit Rehabilitation Plan prepared for approval.

MINISTERIAL ORDERS

1992

1. **DOUGLAS R. LESBIREL AND CAROLYN A. LESBIREL** (Jan. 14, 1992 - Regulation 11/92). Ordered to remove infilled material and breakwater placed in Shubenacadie Grand Lake, Halifax County between June 1 and July 31, 1992.

2. **ROTHSAY, a registered business name for MAPLE LEAF FOODS INC.** (Jan. 28, 1992 - Regulation 42/92). Amends Schedule "A" to Ministerial Order issued on June 19th, 1991 and amended on July 31, 1991. Drainage requirement (Condition #5) revoked. Condition #6 amended. Company to hire a consultant to prepare report (March 1) respecting effluent discharged from the plant. Report to be submitted for approval along with work schedule (July 1).

3. **VERNON KYNOCK TRUCKING LIMITED** (February 18, 1992 - Regulation 56/92). Engineer to prepare report on or before February 29, 1992. Remedial work re: pyritic slate material used on lane adjacent to Beachhill Road, near Seabright, Halifax County, to be completed on or before May 1, 1992.

4. **REVOCATION ORDER** (March 13, 1992 - Regulation _____/92). Revokes order against Seagull Pewter and Silversmiths Limited (147/90); North East Logging, David Smith and James Robert Johnson (239/90); Pictou County Excavators Limited, Mack D. Holmes and Bert Livingston (262/90) and Gordon's Greenhouses Limited and Gay Gordon (63/91).

1981 - 1992

NOVA SCOTIA DEPARTMENT OF THE ENVIRONMENT

	ACT	OFFENCE	DEFENDANT	FINE
		1981		
1.	EPA	Unlawful discharge of contaminant.	Irving Oil Co. Ltd.	Acquitted
2.	WA	Unlawful discharge into watercourse.	Aberdeen Paving Ltd.	Acquitted
		1985		
1.	WA	Discharge into watercourse.	Donald Zinck	$100.00
2.	EPA	Failed to comply with terms of Ministerial Order.	Wedgeport Enterprises Ltd.	$2500.00
		1986		
1.	WA	Unlawful discharge into watercourse.	H.W. Corkum Construction Ltd.	$700.00
2.	WA	Unlawful discharge into watercourse.	Bert Peters	$1200.00
3.	EPA	Discharge of contaminant.	Colin R. MacDonald	Acquitted
4.	WA	Unlawful discharge into watercourse.	Crossley Karastan Carpet Mills Ltd.	Acquitted
		1987		
1.	WA	Unlawful alteration of watercourse.	Seward Grover and Kevin McGrath	$510.00
2(a)	WA	Unlawful alteration of watercourse.	Jack Keddy	$500.00
(b)	WA	Unlawful alteration of watercourse.	Jerry Parker *Plus Restitution	$750.00 $1720.00
3.	WDA	Well drilling without licence.	Sprague's Well Drilling Ltd.	$250.00 for 3 Counts

	ACT	OFFENCE	DEFENDANT	FINE
		1987		
4.	EPA	Breach of Ministerial Order.	Maritime Waste Oil Services Ltd.	$1700.00
5.	WA	Unlawful discharge into watercourse.	Joi-Terra Farms Ltd.	$500.00
6.	WA	Unlawful alteration of watercourse.	Darryl Dorey/ Eloie Thompson	$100.00 each
		1988		
1.	WA	Unlawful discharge into watercourse.	Paul Pieno	$500.00
2.	WA	Unlawful discharge into watercourse.	James Edward Chapman	$500.00
3.	WA	Unlawful alteration of watercourse.	Carmen Milner	$200.00
4.	WA	Unlawful discharge of contaminant.	Scott Maritimes Ltd.	$10,000.00
		1989		
1.	WA	Unlawful alteration of watercourse.	Gilbert R. Veino	$300.00
2.	WA	Unlawful alteration of watercourse.	Douglas Colquhoun Marian Colquhoun	$500.00
3.	WA	Unlawful alteration of watercourse.	Lewis Kelly Sean Mullally	$100.00 $400.00
4.	EPA	Breach of Ministerial Order.	Canchem Inc.	$2,000.00
5.	WA	Unlawful discharge of contaminant.	Oxford Frozen Foods Limited	$4,000.00
6.	PCP (NS)A	Spraying without a permit.	Turfman Lawn Care Limited	$500.00

	ACT	OFFENCE	DEFENDANT	FINE
		1990		
1.	WA S.18(b)	Unlawful alteration of watercourse (Cockscomb Lake, Hants County).	Keith Wile (land owner)	$200.00
2.	WA S.18(b)	Unlawful alteration of watercourse (Cockscomb Lake, Hants County).	Calvin Snow (contractor)	$200.00
3.	WA S.18(b)	Unlawful alteration of watercourse (Grand Lake, Halifax County). See #4.	John Hampson (general contractor)	$200.00
4.	WA S.18(b)	Unlawful alteration of watercourse (Grand Lake, Halifax County). See #3.	Lakeport Contracting Limited (contractor-dozer operator)	$600.00
5.	WA S.18(b)	Unlawful alteration of watercourse (Grand Lake, Halifax County). See #6.	Bill Dolan Backfilling (1976) Limited (contractor)	$100.00
6.	WA S.18(b)	Unlawful alteration of watercourse (Grand Lake, Halifax County). See #5.	Noel H. Feetham (landowner)	$200.00
7.	WA S.17 (SOT)	Unlawful alteration of of watercourse (Marsh Road, Pictou County).	Frederick M. Mills	Dismissed (Limitation Period Expired)
8.	PCP(NS) Act S.16(a) (SOT)	Failing to put decal on public notice. Reglation 15(5)(a) (Cleveland, Richmond County).	Precision Vegetation Management Inc.	$250.00
9.	WA 12(1) (SOT)	Extending waterworks without prior approval of Minister (Dartmouth. Halifax County, N.S.).	F.S.R. Holdings Limited	$365.00

	ACT	OFFENCE	DEFENDANT	FINE
10.	WA 17 (SOT)	Altering a watercourse without approval of Minister (Earlstown, Colchester County).	James R. Johnson	$307.50
11.	WA 17 (SOT)	Altering a watercourse without approval of Minister (Coldstream, ColChester Co., Sept. 27/90).	Thomas Green Harper	$307.50
12.	WA 17 (SOT)	Altering a watercourse without approval of the Minister (East Loon Lake, Halifax Co., Sept. 26/90).	Wayne Atkinson	$307.50
13.	WA 17 (SOT)	Altering a watercourse without approval of Minister (Barrie Brook, Guysborough County)	Construction Aggregates Limited	$307.50
14.	WDA S.3(a) (SOT)	Contracting to drill a well for gain or reward without a licence (Cow Bay, Hfx. Co.). Trial on October 25, 1990 - Judge Fran Potts.	Leslie Sprague	Found Not Guilty
15.	WA 15 (SOT)	Unlawful discharge into a watercourse (Sydney, Cape Breton)	Martell Construction Limited	$307.50
16.	WA 17 (SOT)	Altering a watercourse without approval of the Minister (Sable River, Shelburne County) Dec. 6/90	Wayne S. Rideout	$307.50
17.	WA 17 (SOT)	Altering a watercourse without approval of the Minister (Sable River, Shelburne County) Dec. 6/90	Swansburg Construction Limited	$307.50

	ACT	OFFENCE	DEFENDANT	FINE
		1991		
1.	WA S.17 (SOT)	Altering watercourse without approval of Minister (Blair Lake, Cumberland County)	Fundy Carpet Limited	$307.50
2.	WA S.17 (SOT)	Altering watercourse without approval of Minister (Hubley Big Lake, Halifax County)	Three Brooks Development Corporation Ltd.	$307.50
3.	WA S.17 (SOT)	Altering watercourse without approval of Minister (Five Island Lake, Halifax County)	Hinterlands Development Limited	$307.50
4.	WA S.17 (SOT)	Altering watercourse without approval of Minister (Grand Lake, Halifax County)	Douglas R. Lesbirel	$307.50
5.	PCP(NS) Act S.16(a) (SOT)	Handling pest control products contrary to regulations (Prospect Road, Halifax County)	Eastern Tree Services Limited	$250.00
6.	WA S.17	Altering watercourse without approval of Minister (St. Croix, Hants County)	John Irving Hart	$500.00
7.	WA S.17	Altering watercourse without approval of Minister (West Pubnico, Yarmouth County)	West Pubnico Golf and County Club Limited	$1000.00 plus remedial work of $41,000
8.	WA S.17	Altering watercourse without approval of Minister (Fredericton, New Brunswick)	Atlantic Golf Construction Limited	$1000.00
9.	EPA S.23(1) (SOT)	Causing pollution without a permit (Sydney River, Cape Breton County)	N.S. Department of Transportation	$595.00

	ACT	OFFENCE	DEFENDANT	FINE
10.	Asbestos Waste Regs S.9	Transporting asbestos waste improperly packaged (Harrietsfield, Halifax Co.)	Mechanical Engineering Limited	$2,000.00
11.	General Litter Abatement Regs S.8(2)	Failure to clean up property within 50 feet of food concession (Blowers St., Halifax)	European Food Shop Limited	$300.00
12.	WA S.17 (SOT)	Unlawful alteration of watercourse (Deerfield, Yarmouth Co.)	Alfred Hurlburt	$307.50
13.	Petroleum Storage Regs S.10(1)(a)	Failing to report petroleum product spill (Oxford, Cumberland Co.)	Gordon's Greenhouses Limited	$4,500.00 plus $60,000 - $70,000 remedial work
14.	EPA S.23(1) (SOT)	Discharging waste causing pollution without a permit (Englishtown, Victoria County)	Colin R. MacDonald Limited	$595.00
15.	PCP(NS) Act S.14(1)(c) (SOT)	Applying a pest control product without a permit (Kings County, Wolfville)	Braemar Pest Control Limited	$595.00
16.	DG&HW Mgmt. Act S.8(a) (SOT)	Failing to notify Minister of accidental discharge (Sydney, Cape Breton County)	Bens Limited	$365.00
17.	WA S.17 (SOT)	Unlawful alteration of watercourse (Beaver Dam, Halifax County)	Brian W. Smith	$307.50
18.	PCP(NS) Act S.12(1) (SOT)	Operating as a vendor without license (Truro, Colchester Co.)	Canada Packers Inc. Shur Gain Division	$595.00
19.	EPA S.23(1) (SOT)	Causing pollution without permit (Harrietsfield, Halifax County)	B.H. Fancy Construction Ltd.	$595.00

	ACT	OFFENCE	DEFENDANT	FINE
20.	WA S.15 (SOT)	Unlawful discharge into watercourse (Lower Sackville, Halifax County)	Sackville Trenching Limited	$307.50
21.	WA S.17 (SOT)	Unlawful alteration of watercourse (Waverley, Halifax County)	Charles W. Shortt	$307.50
22.	WA S.17 (SOT)	Unlawful alteration of (Truemanville, Cumberland County)	R.A. Hoeg & Sons Ltd.	$307.50
23.	General Litter Abatement Regs S.7 (SOT)	Unlawful discharge of litter (Upper Sackville, Halifax County)	Owen Davis Trucking Limited	Withdrawn
24.	WA S.15 (SOT)	Unlawful discharge of material into watercourse (Dartmouth, Halifax County)	Casavecchia Contracting Limited	$307.50
25.	Waste Oil Regs S.14 (SOT)	Unlawfully applying waste oil to public/private roadway (Dartmouth, Halifax County)	Casavecchia Contracting Limited	$595.00
26.	WA S.17 (SOT)	Unlawful alteration of watercourse (Lake Echo, Halifax County)	Mountain View Mobile Home Park	$307.50
27.	Asbestos Waste Regs S.15 (SOT)	Transport asbestos without prescribed equipment (Mount Uniacke, Hants County)	Herbert Tilley	$595.00
28.	WA S.17 (SOT)	Unlawful alteration of watercourse (Fall River, Halifax County)	Gary Michael Oickle	$307.50
29.	WA S.17 (SOT)	Unlawful alteration of watercourse (Mineville, Halifax County)	David A. Bellefontaine	$307.50

	ACT	OFFENCE	DEFENDANT	FINE
30.	WA S.15 (SOT)	Unlawful discharge of material into watercourse (Bissett Lake, Halifax County)	Kiel Developments Limited	$307.50
31.	GLA Regs S.5 (SOT)	Unlawful discharge of litter into the environment (Greenwood Heights, Halifax County)	Allied Roofing Masonary & Construction Limited	$307.50
32.	GLA Regs S.5 (SOT)	Unlawful discharge of litter into the environment (Greenwich, Kings County)	Stirling Fruit Farms Limited	$250.00
33.	EPA S.23(1) (SOT)	Causing pollution without permit (Sydney, Cape Breton County)	Public Works Canada	Withdrawn
34.	WA S.17 (SOT)	Unlawful alteration of watercourse (Upper Musquodoboit, Halifax County)	Ross Lionel Benison	$307.50
35.	WA S.26(5) (SOT)	Failure to comply with Ministerial Order (Tatamagouche, Colchester County)	Municipality of the County of Colchester	$595.00

	ACT	OFFENCE	DEFENDANT	FINE
		1992		
1.	WA S.17 (SOT)	Unlawful alteration of watercourse (Beechmont, Cape Breton County)	Harold D. Cameron	$307.50
2.	EPA S.23(1) (SOT)	Unlawful discharge of material into environment (Plymouth, Pictou County)	Westray Coal, a division of Curragh Resources Inc.	$595.00
3.	EPA S.23(1)	Unlawful discharge of material into environment (Canso, Guysborough County)	Seafreez Foods Inc.	$15,000.00
4.	EPA 23(2)	Unlawful removal of material from the environment (New Minas, Kings County)	Ian Sinclair Contracting Services Limited	Acquitted Jan. 22/92 Appeal Filed
5.	WA S.17 (SOT)	Unlawful alteration of watercourse (Boylston, Guysborough County)	Robin C. Cook	$307.50
6.	WA S.12 (SOT)	Unlawful alteration of water works (Purcell's Cove, Halifax County)	Ghosn F. Nassen	$365.00

Environmental Protection Act

CHAPTER 150 OF THE REVISED STATUTES, 1989

Appeal

53 (1) A person who is aggrieved by a regulation made under this Act or by the refusal of the Minister to grant or issue a permit, or the suspension or cancellation of a permit by the Minister, or the granting of a permit by the Minister, subject to terms and conditions, or the issuance or variation of a control order, or the issuance or amendment of a stop order, or by the refusal of the Minister to approve of plans or specifications under Section 28, or by an order of the Minister under Section 34, may appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the county court and the decision of the judge of the county court shall be final and binding on the Minister and on the appellant, and the Minister or the appellant, or both of them shall take such action as may be necessary to implement the decision.

Evidence on appeal

(2) The judge of the county court, on the hearing of an appeal under subsection (1), may consider and hear evidence as to whether or not the matter which aggrieves the appellant is necessary to provide for the preservation and protection of the environment. 1973, c. 6, s. 53.